Relocation of a Specified Servitude of Right of Way

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Thesis presented in fulfilment of the for the degree of Master of Laws at Stellenbosch University

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December 2010

Declaration

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

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Summary

Traditionally, the common law rule as interpreted by South African case law required that mutual consent be obtained in order to relocate a specified servitude of right of way. Since the *Linvestment* judgment, the legal position pertaining to the unilateral relocation of a specified servitude of right of way is that the location of an existing specified servitude of right of way may be altered unilaterally by the owner of the servient tenement. Unilateral relocation of a specified servitude of right of way will only be allowed if strict requirements are met, namely that the servient owner will be materially inconvenienced in the use of his property if the status *quo* is maintained; that the relocation will not prejudice the owner of the dominant tenement; and that the servient owner pays all costs incurred in the relocation of the servitude.

In order to justify the departure from the common law, the court in *Linvestment* relied on historical argument, comparative law, and policy arguments to reach the conclusion that a servitude may be relocated unilaterally if it is in the interest of fairness, equity and justice. The court relied on section 173 of the Constitution, which entitles the courts to develop the common law.

This decision of the Supreme Court of Appeal has far-reaching implications. A servitude is a limited real right to the property of another person which grants the holder of that right specific entitlements. South African law requires that registration in the deeds registry take place in terms of section 63(1) of the Deeds Registries Act 47 of 1937 as soon as a limited real right in immovable property is created or transferred. Once the servitude is registered, it will be enforceable against the owner of the servient tenement and all his successors in title. When the servient owner is allowed to relocate the servitude unilaterally, it will have the effect of undermining the limited real right that the dominant owner holds in the property in question.

This thesis evaluates the extent to which the courts may change common law principles on the basis of fairness, justice and equity. The conclusion is that the policy grounds on which the court based its decision are convincing, as the law cannot remain rigid and needs to be continually changed in order to meet changing conditions. However, the comparative and historical reasons provided for the decision are insubstantial and unconvincing. The thesis points out that there are no historical grounds for the decision, but that more extensive and

contextual comparative research does support the decision. This thesis considers the constitutional implications of a flexible legal approach to the unilateral relocation of a specified servitude of right of way and concludes that an approach that allows for unilateral relocation will not amount to an expropriation and will not establish an arbitrary deprivation either, provided that the requirements set out in the decision are applied strictly and that a court order is required for the relocation.

Opsomming

Die tradisionele gemeenregtiglike beginsel rakende die verlegging van ‘n gespesifiseerde reg van weg het vereis dat wannneer ‘n roete eers vasgestel is, die eienaar van die dienende erf dit nie mag verander nie tensy hy toestemming verkry het van die eienaar van die heersende erf. Sedert die uitspraak in *Linvestment*, is die regsposisie dat die eienaar van die dienende erf wel die ligging van ‘n serwituut eensydig mag verander. Die eienaar van die dienende erf sal slegs gemagtig wees om die servituut te verskuif onder omstandighede waar die huidige ligging van die serwituut wesenlike materiële nadeel vir hom meebring, die verskuiwing van die serwituut geen nadeel vir die eienaar van die heersende erf sal veroorsaak nie en mits die eienaar van die dienende erf die kostes wat verband hou met die verskuiwing van die serwituut sal dra.

Die hof het op historiese, regsvergelykende en beleidsoorwegings gesteun om die gevolgtrekking te staaf dat ‘n serwituut verkuif kan word, selfs al is dit teen die wens van die eienaar van die heersende erf. Die hof het ook beslis dat die howe die inherente bevoegdheid het om die gemenereg te ontwikkel ingevolge artikel 173 van die Grondwet.

Die beslissing het verreikende implikasies. ‘n Serwituut is ‘n beperkte saaklike reg op die saak van iemand anders wat aan die reghebbende bepaalde genots- en gebruiksbevoegdhede ten aansien van daardie saak verleen. Artikel 63(1) van die Registrasie van Aktes Wet 47 van 1937 vereis dat ‘n beperkte saaklike reg ten aansien van onroerende goedere geregistreer moet word sodra ‘n beperkte saaklike reg gevestig word. Indien die serwituut geregistreer word, sal dit afdwingbaar wees teen die eienaar van die dienende erf asook sy regsopvolgers. Indien die genoemde eienaar gemagtig is om die serwituut eensydiglik te verskuif, sal dit inbreuk maak op die eienaar van die heersende erf se beperkte saaklike regte ten aansien van die dienende erf.

Die doel van hierdie tesis is om te evalueer tot watter mate howe daartoe in staat is om die gemenereg te verander op grond van billikheid en geregtigheid. Die gevolgtrekking is dat die hof se beleidsargumente oortuigend is aangesien die reg voortdurend moet verander ten einde te voldoen aan die veranderende omstandighede. Die regsvergelykende en historiese gronde vir die hof se gevolgtrekking is egter onoortuigend. Die tesis illustreer dat daar geen historiese gronde bestaan vir die beslissing nie asook dat meer ekstensiewe en kontekstuele regsvergelykende navorsing wel die hof se beslissing staaf. Hierdie tesis

evalueer ook die grondwetlike implikasies van die nuwe reël en kom tot die gevolgtrekking dat die toepassing van ‘n benadering ingevolge waarvan die eienaar van ‘n dienende erf gemagtig word om ‘n serwituut eensydig te verskuif, nie ‘n onteiening of ‘n arbitrêre ontneming teweegbring nie op voorwaarde dat die vereistes soos uiteengesit in die uitspraak aan voldoen word en dat die verkryging van ‘n hofbevel ‘n moontlike voorvereiste is vir die verskuiwing van ‘n serwituut.

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Chapter 1: Introduction

1.1 Introduction

The traditional common law position relating to a praedial servitude of right of way is that when the servitude is constituted generally, the entire servient tenement will be subject to the servitude.[1] In such a case the owner of the dominant land will be entitled to select a particular route, provided that he does so *civiliter modo*.[2] Once the owner of the dominant tenement has selected a route, he may not change it without the consent of the owner of the servient tenement.[3] In his commentary, Voet states that if the route chosen by the dominant tenement proprietor is burdensome for the owner of the servient tenement, the owner of the servient tenement may suggest an alternative route which is equally convenient for the dominant tenement.[4] However, Voet does not specify whether the abovementioned legal principle regarding the relocation of servitudes applies to a specified servitude of right of way. Traditionally, the same flexibility did not apply in circumstances where the servitude of right of way had been specified.[5] Prior to the judgment in *Linvestment*, the South African case law required that mutual consent be obtained in order to relocate a specified servitude of right of way.[6] In *Gardens Estate Ltd v Lewis*,[7] the court drew a clear distinction between a duly constituted servitude and a servitude created in

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[1] Van Leeuwen *RHR* 2 21 6 (Van Leeuwen S 1625-1682 *Commentaries on Roman-Dutch law* edited and translated by Decker CW & Kotzé JG (2nd ed 1921)); *Nach Investments (Pty) Ltd v Yaldai Investments (Pty) Ltd & Another* 1987 (2) SA 820 (A).

[2] *D* 8 1 9 (Corpus Juris Civilis translated and edited by Scott SP *The Civil Law: Including the Twelve Tables. The Institutes of Gaius. The Opinions of Paulus. The Enactments of Justinian and the Constitutions of Leo* (1973)); Voet 8 3 8 (Citations from Voet J *Commentarius ad Pandectas (Part II Servitudes Book VIII)* translated into English by Hoskyns L (1876); Voet J 1647-1713 *Commentarius ad Pandectas* translated by Gane P *Commentary on the Pandect* (1955-1958)). *Laubscher v Rive & Others* (1866) 5 Searle 195; *Landman v Daverin* (1881-1882) 2 EDC 18; *Divisional Council of Kimberley v Executrix Testamentary of Sheasby* (1892) 6 HCG 167 at 173; *Smit v Russouw & Others* 1913 CPD 847; *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 619; *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467; *Reid v Rocher* 1946 WLD 294; *Nach Investments (Pty) Ltd v Yaldai Investments (Pty) Ltd and Another* 1987 (2) SA 820 (A).

[3] Van der Merwe CG *Sakereg* (2nd ed 1989) 483 cites Caepolla *De Servitutibus* 1 7; Christiniaeus *In Leges Municipales Mechlinienses* 14 50; *Fuchs v Lys* (1889-1890) 3 SAR 36 at 38; *Van Heerden v Coetzee & Others* 1914 AD 167; *Gardens Estate Ltd v Lewis* 1920 AD 144 at 150.

[4] Voet 8 3 8 *Allen v Colonial Government* (1907) 24 SC 1 at 7; *Rubidge v McCabe & Sons and Others, McCabe & Sons and Others v Rubidge* 1913 AD 433; *Smit v Russouw & Others* 1913 CPD 847; *Reid v Rocher* 1946 WLD 294 at 300.

[5] Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The Principles of the Law of Property in South Africa* (2010) 245.

[6] *Gardens Estate Ltd v Lewis* 1920 AD 144.

[7] 1920 AD 144.

general.[8] The judge stated that when Voet speaks of the owner of the servient tenement having a right to point out another route than that which has been agreed upon, he speaks of servitudes created in general.[9]

The traditional common law principle pertaining to the unilateral relocation of a specified servitude of right of way as interpreted by the South African case law[10] was overturned in the decision of *Linvestment*. Since the *Linvestment* judgment, the legal position pertaining to a specified servitude of right of way is that the location of an existing servitude of right of way may be altered unilaterally by the servient owner, provided that the servient owner will be materially inconvenienced in the use of his property if the status *quo* is maintained, that the relocation will not prejudice the owner of the dominant tenement, and that the servient owner pays all costs incurred in the relocation of the servitude.[11] The court referred to historical and policy considerations and relied on comparative law to reach the conclusion that servitudes may be relocated if it is in the interest of fairness, equity and justice.[12] Additionally, the court relied on section 173 of the Constitution to justify its departure from the common law.[13]

The problem with the *Linvestment* judgment is that the court made a striking change to the common law on the basis of insubstantial historical and comparative argument. The historical reasons are insubstantial because Heher AJ relied exclusively on a draft Dutch civil code which never formed part of the received Roman-Dutch law, while dismissing the authority of Voet and the case law that developed around it.[14] The comparative analysis can also be regarded as problematic because Heher AJ relied on secondary sources in order to support his argument, without discussing their comparative context. Without the context it is difficult to assess why and how the relevant foreign jurisdictions relaxed their rules regarding relocation of a servitude.

Furthermore, the court in *Linvestment* created uncertainty by deciding that a specified servitude of right of way can be changed unilaterally, without specifying whether the

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[8] *D* 8 1 9.
[9] *Gardens Estate Ltd v Lewis* 1920 AD 144 at 150.
[10] *Gardens Estate Ltd v Lewis* 1920 AD 144.
[11] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 35.
[12] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) paras 23-31.
[13] S 173 of the Constitution entitles the courts to develop the common law.
[14] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) paras 22-24.

relocation is only possible upon the granting of a court order to that effect. A servitude is a limited real right to the property of another person which grants the holder of that right specific entitlements.[15] When creating or transferring a limited real right in immovable property, South African law requires that registration in the deeds registry take place in terms of section 63(1) of the Deeds Registries Act 47 of 1937. The registered servitude will then be enforceable against the owner of the servient tenement and all his successors in title. A servitude is registered against the title deed of the servient tenement to serve as a notice to the whole world of its existence.[16] The purpose and effect of registration is that the registered servitude will be enforceable against the owner of the servient tenement and all his successors in title. When the servient owner is allowed to tread over the proprietary rights of the dominant owner, it will have the effect of eroding the limited real rights that the dominant owner holds in the property in question.[17]

1.2 Research question and hypothesis

This thesis investigates whether the methodology used and the reasons provided in *Linvestment CC v Hammersley*[18] (*Linvestment*) to reach the conclusion, namely that unilateral relocation of a specified servitude of right of way is possible in South African law, are convincing and sufficient.

In *Linvestment*,[19] the Supreme Court of Appeal decided that in South African law it is possible for the owner of the servient tenement to obtain a unilateral relocation of a specified servitude of right of way. This decision of the Supreme Court of Appeal has far-reaching implications. The judgment creates uncertainty in the law and confirms the possibility for courts to trump long-established principles. Granting an order which allows the unilateral relocation of a servitude will defeat the purpose and effect of registration.[20] It

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[15] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 321.
[16] Van der Merwe CG "Servitudes and other real rights" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 591-629 at 612.
[17] *Linvestment CC v Hammersley and Another* [2007] 3 All SA 618 (N) para 43.
[18] [2008] 2 All SA 493 (SCA).
[19] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA).
[20] *Linvestment CC v Hammersley and Another* [2007] 3 All SA 618 (N) para 41.

would also complicate the meaning, interpretation and effect of a real right.[21] This research aims to evaluate whether the historical, policy, comparative and constitutional reasons provided for the decision are convincing in view of the long-standing authority that is overthrown in the process. In addition, it will assess the extent to which the courts may change common law principles on the basis of fairness, justice and equity. The policy grounds on which the court based the decision are welcomed and to a certain extent convincing, since the law cannot remain rigid and needs to be continually changed in order to meet changing conditions. However, the comparative and historical reasons provided for the decision are insubstantial and unconvincing. Although the policy reasons for the decision were strong, the court could have provided more comprehensive historical and comparative justification.

The methodology of this thesis will consist of the discussion of the *Linvestment* case in view of the traditional legal position regarding the relocation of a specified servitude, a comparative study, a constitutional analysis and a policy analysis.

1.3 Overview of chapters

Chapter 2 will analyse the impact of the *Linvestment* judgment on the traditional common law principles pertaining to the relocation of a specified servitude of right of way. This chapter will give an overview of the traditional common law principles relating to praedial servitudes in general, with the emphasis on the common law principles relating to praedial servitudes of right of way. Furthermore, chapter 2 will analyse how case law prior to the *Linvestment* judgment interpreted Voet's statement of the principle pertaining to the relocation of a specified servitude of right of way. Subsequently, the chapter will discuss the legal position after the Supreme Court of Appeal's judgment in *Linvestment*.

The court in *Linvestment*[22] decided the case in line with the international trend to follow a more flexible legal approach. The court referred to the *Ontwerp* of Professor Meijers.[23]

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[21] *Linvestment CC v Hammersley and Another* [2007] 3 All SA 618 (N) para

[22] [2008] 2 All SA 493 (SCA).

[23] Meijers EM *Ontwerp voor een Nieuw Burgerlijk Wetboek 2 Toelichting* (Book 5) (1955) at 428. See footnote 32 in *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 27. This research did not focus on the Italian, Swiss and Greek law due to the language barrier. The jurisdictions that are investigated in this

Professor Meijers stated that the unilateral relocation of a specified servitude of right of way is recognised by many foreign codes, including Switzerland, Italy and Greece, provided that the servient owner proves that the dominant owner's servitutal rights will not be reduced.[24] Furthermore, the court referred briefly to the Belgian Civil Code and the German Civil Code as well as the discussion of the Scots law by Cuisine and Paisley.[25] Even though the arguments based on comparative grounds are convincing, the problem with the methodology of this decision is that the court never did a proper, in-depth legal background analysis of the foreign law in order to support the argument. Instead of using primary sources, the court used only secondary sources, without any discussion of their comparative value or context. The aim of chapter 3 is to do a more contextual analysis of the Dutch, German, US, Scots and English legal position pertaining to the unilateral relocation of a specified servitude of right of way to establish more concretely whether, why and how these jurisdictions allow (or prefer not to allow) unilateral relocation of servitudes.

Even though the policy reasons provided by the court to justify its departure from the common law are convincing, the court failed to evaluate the constitutional implications of the recently developed common law pertaining to the relocation of a specified servitude of right of way. When developing the common law, the courts must determine whether the common law is inadequate when measured against the objectives of section 39(2). When the common law is deficient, the courts have to determine what ought to be done to meet those objectives. When giving content to the common law principles, the courts should ensure that the common law reflects the spirit, purport and objectives of the Bill of Rights.[26] Chapter 4 will assess the constitutional implications regarding the application of a flexible legal approach pertaining to the unilateral relocation of a specified servitude of right of way. The constitutional aspect concerns section 25(1) of the 1996 Constitution of the Republic of South Africa which contains the deprivation provision of the property clause.

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thesis provide sufficient results to enable the conclusion that servitudes will in most circumstances be subsidiary to society's need for flexibility in instances where the original location of the servitude becomes too burdensome for the owner of the servient estate, provided that the relocation does not prejudice the dominant owner. See Chapter 3 section 3.4. Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 385.

[24] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA).

[25] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 28-29.

[26] Midgley JR & Van der Walt JC "Delict" in Joubert WA (ed) *LAWSA* vol 8(1) (2005) 23.

This section provides that no one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property. The test for arbitrary deprivation is set out in *First National Bank of SA Ltd t/a Wesbank v Commisioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*.[27] A deprivation of property will be regarded as "arbitrary" in terms of section 25 when there is not a sufficient reason for the particular deprivation or it is procedurally unfair.[28] When applying the test for arbitrary deprivation to *Linvestment*, it can be questioned whether the result of the *Linvestment* judgment, namely that a servitude can be relocated unilaterally constitutes an arbitrary deprivation of property, may be in conflict with section 25(1) of the Constitution. A second constitutional aspect of the decision in *Linvestment* is the question whether the decision and the possibility that a specified servitude of right of way may be relocated unilaterally could constitute an expropriation of property (particularly expropriation of the rights of the owner of the dominant tenement) and, if so, whether such expropriation is in conflict with sections 25(2) and 25(3) of the Constitution.

Chapter 5 will evaluate whether it is justifiable for courts to overturn long-established common law principles based on the grounds of justice, equity and practicality. This chapter will investigate whether the policy reasons provided in *Linvestment* to reach its conclusion, namely that unilateral relocation of a specified servitude of right of way is possible in South African law, are convincing and sufficient.[29] The issue is to determine which legal approach is the correct one, namely to adhere to the traditional common law rule which prohibits the unilateral relocation of the servitude by the owner of the servient tenement unless consent has been obtained from the owner of the dominant tenement or to adopt the flexible legal approach that allows the unilateral relocation of a servitude.[30] In the first part of the chapter, the various arguments pertaining to the traditional common law

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[27] 2002 (4) SA 768 (CC).
[28] *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.
[29] Most of the articles cited in the policy analysis chapter are based on the US law regarding the unilateral relocation of a specified servitude of right of way. The reason for this is that in the US there are a wide range of materials discussing every aspect of rules regulating the relocation of a specified servitude of right of way. It seems as if the US law pertaining to the relocation of a specified servitude of right of way is more advanced and well developed.
[30] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 8.

and flexible legal approach will be discussed. Issues that will be addressed are whether a choice between the two rules matters, whether decision makers should prefer clear "property rules" or muddier "liability rules"[31] and the different proposals as to how the rules can be improved in order to strike a balance between the interests of the different parties to the servitude-creating contract.

The rest of this chapter will make use of law and economics theory to analyse the legal problem pertaining to the right of a servient tenement owner to relocate a servitude unilaterally. The economic approach to property law emphasises the role of property law in promoting an efficient allocation of resources.[32] This chapter aims to assess the on-going debate regarding the selection of an appropriate rule from a law and economics point of view which will have the effect of creating an efficient outcome for owners of both the servient and the dominant tenement.

[31] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 5. See Calabresi G & Melamed AD "Property rules, liability rules and inalienablity: One view of the cathedral" (1972) 85 *Harv LR* 1089-1129 at 1092.
[32] Miceli TJ "Property" in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 at 246.

Chapter 2: Linvestment CC v Hammersley and South African Law

2.1 Introduction

The aim of this chapter is to focus on the judgment of *Linvestment CC v Hammersley*[1] (*Linvestment*) and its effect on the traditional common law principle relating to the relocation of praedial servitudes of right of way.

The traditional common law position relating to a praedial servitude of right of way is as follows: If the servitude is constituted generally, the entire servient tenement will be subject to the servitude.[2] In such a case the owner of the dominant land will be entitled to select a particular route, provided that he does so *civiliter modo*.[3] Once the owner of the dominant tenement has selected a route, he may not change it without the consent of the owner of the servient tenement.[4] In his commentary, Voet states that if the route chosen by the dominant tenement proprietor is burdensome for the owner of the servient tenement, the owner of the servient tenement may suggest an alternative route which is equally convenient for the dominant tenement:[5]

> "But nothing in this prevents the owner of the servient tenement from making a change, and fixing on some other part of his property for the exercise of the right of passage, or of driving, or of way, than that determined on previously, either by

[1] [2008] 2 All SA 493 (SCA).
[2] See Van Leeuwen *RHR* 2 21 6; *Nach Investments (Pty) Ltd v Yaldai Investments (Pty) Ltd & Another* 1987 (2) SA 820 (A).
[3] *D* 8 1 9; Voet 8 3 8; *Laubscher v Rive & Others* (1866) 5 Searle 195; *Landman v Daverin* (1881-1882) 2 EDC 18; *Divisional Council of Kimberley v Executrix Testamentary of Sheasby* (1892) 6 HCG 167 at 173; *Smit v Russouw & Others* 1913 CPD 847; *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 619; *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467; *Reid v Rocher* 1946 WLD 294; *Nach Investments (Pty) Ltd v Yaldai Investments (Pty) Ltd and Another* 1987 (2) SA 820 (A).
[4] Van der Merwe CG *Sakereg* (2nd ed 1989) 483 cites Caepolla *De Servitutibus* 1 7; Christiniaeus *In Leges Municipales Mechlinienses* 14 50; *Fuchs v Lys* (1889-1890) 3 SAR 36 at 38; *Van Heerden v Coetzee & Others* 1914 AD 167; *Gardens Estate Ltd v Lewis* 1920 AD 144 at 150.
[5] Voet 8 3 8; *Allen v Colonial Government* (1907) 24 SC 1 at 7; *Rubidge v McCabe & Sons and Others, McCabe & Sons and Others v Rubidge* 1913 AD 433; *Smit v Russouw & Others* 1913 CPD 847; *Reid v Rocher* 1946 WLD 294 at 300.

election or by the agreement: provided only that this change in no way prejudices the owner of the dominant tenement."[6]

However, Voet did not specify whether the abovementioned legal principle regarding the relocation of servitudes applies to a specified servitude of right of way. It is not clear either whether the owner of the servient tenement enjoys a similar right, namely to relocate a servitude if it becomes burdensome for him, even in the case where the route of the servitude had been specified. Traditionally, the same flexibility did not apply in circumstances where the servitude of right of way had been specified.[7] Prior to the judgment in *Linvestment*, the South African case law required that mutual consent be obtained in order to relocate a specified servitude of right of way.[8]

The traditional common law principle pertaining to the unilateral relocation of a specified servitude of right of way as interpreted by the South African case law[9] was overturned in the decision of *Linvestment*. Since the *Linvestment* judgment, the legal position pertaining to the unilateral relocation of a specified servitude of right of way is that the location of an existing specified servitude of right of way may be altered unilaterally by the owner of the servient tenement, provided that the servient owner will be materially inconvenienced in the use of his property if the status *quo* is maintained, that the relocation will not prejudice the owner of the dominant tenement, and that the servient owner pays all costs incurred in the relocation of the servitude.[10] The implication of this judgment is that the legal position regarding the relocation of a specified servitude of right of way is now regulated by the principles that previously applied only to the relocation of servitudes created under a general servitude.[11]

Before discussing the main issue, namely the impact of the *Linvestment* judgment on the traditional common law principles pertaining to the relocation of a specified servitude of right of way, this chapter will give an overview of the traditional common law principles

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[6] Voet 8 3 8. (Citations from Voet J *Commentarius ad Pandectas (Part II Servitudes Book VIII)* translated into English by Hoskyns L (1876)).
[7] Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The Principles of the Law of Property in South Africa* (2010) 245.
[8] *Gardens Estate Ltd v Lewis* 1920 AD 144.
[9] *Gardens Estate Ltd v Lewis* 1920 AD 144.
[10] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 35.
[11] Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The Principles of the Law of Property in South Africa* (2010) 245.

relating to praedial servitudes in general, with the emphasis on the common law principles relating to praedial servitudes of right of way.

This chapter will analyse how case law prior to the *Linvestment* judgment interpreted Voet's statement of the principle. Subsequently, the chapter will discuss the legal position after the Supreme Court of Appeal's judgment in *Linvestment*.

2.2 General principles regulating praedial servitudes

2.2.1 Nature of servitudes

Ownership in property can never be absolute,[12] and it will be limited if it is in the interest of the community, neighbours and other holders of rights.[13] A servitude is an example of the way in which the rights of an owner of property may be limited by mutual agreement. A servitude is a limited real right to the property of another person which grants the holder of such a right specific entitlements.[14]

2.2.2 Categories of servitudes

Roman-Dutch law distinguished between two categories of servitudes, namely praedial servitudes and personal servitudes.[15] A praedial servitude is a limited real right in the land of someone else which grants the holder of the servitude certain entitlements of use and enjoyment over the servient land in his capacity as owner of the dominant tenement.[16] Praedial servitudes are constituted in favour of one plot of land (dominant tenement) over

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[12] *Colonial Development (Pty) Ltd v Outer West Local Council* 2002 (2) SA 589 (N) 610; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 93-94.
[13] See examples of limitations imposed on ownership in Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 94-132.
[14] Van der Merwe CG *Sakereg* (2nd ed 1989) 458. The author quotes Puchta GF *Pandekten* edited by Rudorff AF (11th ed 1872) par 178; Arndts L *Lehrbuch des Pandekten* edited by Pfaff L and Hofmann F (14th ed 1889) par 175 and Dernburg H *Pandekten* (6th ed 1900) par 235; Voet 7 1 1; Van Leeuwen *RHR* 2 19 1. See *Dreyer v Letterstedt's Executors* (1865) 5 Searle 88 at 99; *Dreyer v Ireland* (1874) 4 Buch 193 at 199; *Lorentz v Melle & Others* 1978 (3) SA 1044 (T) 1049. See further Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 321; Van der Merwe CG "Servitudes and other real rights" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 591-629 at 592.
[15] Van der Merwe CG *Sakereg* (2nd ed 1989) 459; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 321.
[16] Van der Merwe CG *Sakereg* (2nd ed 1989) 467.

another plot of land (servient tenement).[17] A praedial servitude creates a benefit for the dominant tenement and it imposes a burden on the servient tenement.[18] The benefit and burden created by a praedial servitude run with the dominant land and cannot be detached from the land.[19] Therefore, a praedial servitude will automatically be transferred to the successors in title of the owner of the dominant tenement.[20]

A personal servitude, on the other hand, is a limited real right to the movable or immovable property of someone else which grants entitlements of use and enjoyment over the servient land to the servitude holder in his personal capacity and not in his capacity as owner of land.[21] In contrast to a praedial servitude, a personal servitude is not transferrable to the successors in title of the holder of the servitude as it is inseparably attached to the holder of the right.[22]

2.2.3 Common characteristics of praedial and personal servitudes

Praedial and personal servitudes have certain characteristics in common. Firstly, the holder of the servitude is granted a limited real right in the property of another person which he can enforce with a real remedy against the owner of the property and all his successors in title.[23] Secondly, the holder of the servitude cannot expect the owner of the servient property to do anything positively as a result of the servitude.[24] It is only expected of the owner of the servient property to tolerate and respect the holder of the servitude's

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[17] Van der Merwe CG "Servitudes and other real rights" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 591-629 at 592; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 321.
[18] Van der Merwe CG & De Waal MJ *The Law of Things and Servitudes* (1993) para 215.
[19] Van der Merwe CG "Servitudes and other real rights" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 591-629 at 593; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 321.
[20] Van der Merwe CG & De Waal MJ *The Law of Things and Servitudes* (1993) para 220.
[21] Van der Merwe CG *Sakereg* (2nd ed 1989) 506; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 338.
[22] Van der Merwe CG "Servitudes and other real rights" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 591-629 at 604; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 338.
[23] Van der Merwe CG *Sakereg* (2nd ed 1989) 462. See Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 330-332.
[24] Van der Merwe CG *Sakereg* (2nd ed 1989) 471. See Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 324.

right to use and enjoy the entitlements granted to him.[25] Thirdly, no person can acquire a servitude over his own property and the owner of the property may not transfer the servitude to another person.[26] Finally, the entitlements must at all times be exercised *civiliter modo*, thus the holder of the servitude must exercise them in a reasonable manner, causing as little inconvenience as possible to the owner of the servient tenement.[27]

2.2.4 Praedial servitude requirements

A *numerus clausus* of praedial servitudes is not recognised in South African law.[28] However, to prevent a proliferation of praedial servitudes and undue impediments of land certain requirements must be fulfilled.[29] Certain prerequisites are in place in order to determine whether a praedial servitude was established. Firstly, a praedial servitude can only be granted in respect of immovable property.[30] Secondly, the existence of two tenements,[31] namely a dominant and a servient tenement, belonging to different owners, is a prerequisite for the establishment of a praedial servitude because a praedial servitude always constitutes a burden imposed on one piece of land (the servient tenement) in favour of another piece of land (the dominant tenement).[32] The holder of the servitude is the owner of the dominant tenement and he exercises his entitlements resulting from the servitude registered over the servient tenement.[33] Thirdly, it is also required that the servient and dominant tenements must be situated closely to each other and that the

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[25] Van der Merwe CG *Sakereg* (2nd ed 1989) 471-472. See Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 324-325.
[26] *Lorentz v Melle & Others* 1978 (3) SA 1044 (T); *Erlax Properties (Pty) Ltd v Registrar of Deeds* 1992 (1) SA 879 (A).
[27] Van der Merwe CG *Sakereg* (2nd ed 1989) 466. See Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 331.
[28] Van der Merwe CG & De Waal MJ *The Law of Things and Servitudes* (1993) para 221.
[29] Van der Merwe CG "Servitudes and other real rights" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 591-629 at 593; Gordon WM & De Waal MJ "Servitudes and real burdens" in Zimmerman R, Visser D & Reid KGC (eds) *Mixed Legal Systems in Comparative Perspective* (2004) 735-756 at 738, 743.
[30] Van der Merwe CG *Sakereg* (2nd ed 1989) 460. Van der Merwe CG & De Waal MJ *The Law of Things and Servitudes* (1993) para 216.
[31] Voet 8 1 2; Van der Merwe CG "Servitudes and other real rights" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 591-629 at 593.
[32] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 323; Van der Merwe CG "Servitudes and other real rights" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 591-629 at 593.
[33] Van der Merwe CG "Servitudes and other real rights" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 591-629 at 593.

servitude should offer a permanent benefit to the dominant tenement which increases the value of the dominant tenement.[34] Fourthly, according to the Roman-Dutch law maxim *nulli res sua servit,* a person who owns the two properties, in other words both the dominant and servient tenement, cannot have a servitude as a burden over one plot of land in favour of the other plot of land. Nobody may constitute a servitude over his own property.[35] Fifthly, the maxim *servitus servitutis esse non potest* holds that no further servitudes can be imposed on an existing servitude.[36] The owner of the dominant tenement may not allow his servitude to be used for the benefit of a tenement other than the dominant tenement. There cannot be a servitude on a servitude.[37] A sixth requirement is that a praedial servitude may not impose any active duties on the owner of the servient land.[38] It is only expected of the owner of the servient tenement to endure and respect the owner of the dominant tenement in exercising his rights and duties.[39] In the seventh place, a praedial servitude is in principle indivisible.[40] The exception to this rule will be in the case where the servient tenement is subdivided, which may lead to the partial release of the remaining area because not all parts of the servient tenement will necessarily serve the dominant tenement.[41] The rule of divisibility relating to praedial servitudes is affected by the manner in which the servitude is defined in the title deed, namely whether the servitude is created

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[34] Voet 8 4 19 (Voet J 1647-1713 *Commentarius ad Pandectas* translated by Gane P *Commentary on the Pandect* (1955-1958)); *De Kock v Hänel* 1999 (1) SA 994 (C) 998.

[35] Van der Merwe CG *Sakereg* (2nd ed 1989) 462; Van der Merwe CG "Servitudes and other real rights" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 591-629 at 592; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 322; *Lewis v SD Turner Properties (Pty) Ltd* 1993 (3) SA 738 (W) 740.

[36] *D* 8 3 33 1; *Dreyer v Letterstedt's Executors* (1865) 5 Searle 88 at 99; Van der Merwe CG *Sakereg* (2nd ed 1989) 463; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 323.

[37] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 323.

[38] *D* 8 1 15 1; Voet 8 2 7; Voet 8 4 17, Van der Merwe CG *Sakereg* (2nd ed 1989) 471; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 323. There are two exceptions to this maxim, namely the *servitutis oneris ferendi* which compels the owner of the servient tenement to support a building on the dominant land and the *servitutis altius tollendi* which compels the servient owner to raise the height of his building in order to protect the dominant tenement against hazardous weather conditions. See Van der Merwe CG "Servitudes and other real rights" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 591-629 at 595.

[39] See Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 322-326; Van der Merwe CG & De Waal MJ *The Law of Things and Servitudes* (1993) para 219.

[40] Voet 8 4 9; Van der Merwe CG *Sakereg* (2nd ed 1989) 460, 477; Van der Merwe CG "Servitudes and other real rights" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 591-629 at 597; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 325.

[41] Van der Merwe CG & De Waal MJ *The Law of Things and Servitudes* (1993) paras 222-223.

generally or specifically.[42] If the title deed specifies where or how a servitude ought to be exercised and if the land is subsequently subdivided, "then the specificity of the servitude might entail that it continues to exist over a part of the land only".[43] Conversely, if the servitude does not indicate where or how the servitude is to be exercised, then the whole of the original servient tenement will be subject to the servitude after subsequent subdivisions.[44] The final requirement is that a praedial servitude is in principle perpetual,[45] thus it is enforceable against the owner of the servient tenement and against all his successors in title.[46]

2.2.5 Categories of praedial servitudes

Praedial servitudes may be divided into the following categories: rural praedial servitudes, urban praedial servitudes and statutory praedial servitudes.[47] In contrast to urban servitudes, which are mostly negative, rural praedial servitudes are mostly of a positive nature. A positive servitude grants the dominant owner the right to carry out certain acts on the servient land as opposed to a negative servitude, which entitles the dominant owner to compel the owner of the servient estate to refrain from doing certain acts on the servient land.[48] A right of way; the right to lead water and to draw water; the right to graze cattle; and the right to fetch wood are all examples of traditional rural praedial servitudes.[49] The following servitudes are examples of ancient Roman servitudes of way which continue to

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[42] Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The Principles of The Law of Property in South Africa* (2010) 243.
[43] Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The Principles of The Law of Property in South Africa* (2010) 243.
[44] Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The Principles of The Law of Property in South Africa* (2010) 243-244.
[45] See Voet 8 4 17; Van der Merwe CG "Servitudes and other real rights" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 591-629 at 594: "The servient tenement must serve the dominant tenement on a permanent basis and must not merely serve the personal pleasure of the owner of the dominant tenement.".
[46] Van der Merwe CG *Sakereg* (2nd ed 1989) 460; Van der Merwe CG "Servitudes and other real rights" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 591-629 at 592.
[47] Van der Merwe CG *Sakereg* (2nd ed 1989) 480-501; Van der Merwe CG & De Waal MJ *The Law of Things and Servitudes* (1993) para 224; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 326.
[48] Van der Merwe CG "Servitudes and other real rights" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 591-629 at 597.
[49] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 326-327.

form part of our modern law: *iter* (the right to walk or ride on horseback across servient land); *actus* (the right to drive cattle or light vehicles over servient land); and *via* (the servitude which allows passage of all kinds of traffic).[50]

Examples of urban praedial servitudes would be the right of the owner of the dominant tenement to insert a beam of his building into the building on the servient tenement[51] and the right of the holder of the servitude to prevent the construction of any buildings on the servient tenement beyond a certain height.[52] The respective rights to dam, drain, store and lead water in terms of the National Water Act 36 of 1998 are examples of statutory servitudes.

2.2.6 Rights and duties of the dominant and servient owners

The nature and extent of the rights and duties of the owners of the dominant and servient tenement will depend on the terms and conditions of the agreement which constitutes the servitude.[53] The rights of the parties are implied by law, but these rights may also be confirmed expressly or it may be varied within certain limitations by means of conventional servitude conditions in a deed.[54] The law prohibits the owner of the servient tenement to use his property as he deems fit.[55] The servitude holder is entitled to the unrestricted enjoyment of the servitude.[56] However, he may not exercise his rights in a manner which is inconsistent with the terms and conditions of the servitude.[57] The servitude holder should exercise his rights in a civil manner, causing as little inconvenience as possible to the owner of the servient land without increasing the burden on the servient land.[58] If the owner of the servient tenement seeks to restrict the owner of the dominant tenement in the exercise of his or her rights and if the owner of the servient estate exceeds his rights the

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[50] Van der Merwe CG *Sakereg* (2nd ed 1989) 481-482; Van der Merwe CG "Servitudes and other real rights" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 591-629 at 598.
[51] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 327.
[52] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 327.
[53] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 330.
[54] Cuizine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) 387.
[55] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 331.
[56] Van der Merwe CG & De Waal MJ *The Law of Things and Servitudes* (1993) para 219.
[57] Van der Merwe CG "Servitudes and other real rights" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 591-629 at 593.
[58] Van der Merwe CG "Servitudes and other real rights" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 591-629 at 593.

two parties may apply to court for a declaration of their rights.[59] When the parties have complied with all the requirements, they may enforce the specific duties agreed upon between the two of them by way of an interdict.[60] If either of the two parties is able to prove that he or she has suffered patrimonial loss, that party is entitled to claim damages if the other party exceeds his or her rights.[61] The agreement between the parties will be interpreted strictly, and the terms of the servitude will be construed in a manner which is least burdensome for him or her. The rights of the parties to a servitude must be interpreted according to the general canons of construction.[62] In *Glaffer Investments (Pty) Ltd v Minister of Water Affairs and Forestry*[63] the court held that a servitude has to be interpreted according to its wording and in light of the surrounding circumstances prevailing when it was grounded. If any uncertainty should exist regarding the existence of a praedial or a personal servitude, the least onerous interpretation should be followed.[64]

2.2.7 Registration of servitudes

Servitudes can be acquired by means of a state grant,[65] by statute,[66] by delivery of movables[67] or by registration against the title deeds of the servient land.[68] When creating or transferring a limited real right in immovable property, South African law requires that registration in the deeds registry take place in terms of section 63(1) of the Deeds

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[59] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 331.
[60] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 331.
[61] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 331.
[62] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 330.
[63] 2000 (4) SA 822 (T) 828. In *Murray v Schneider* 1958 (1) SA 587 (A) it was stated that the surrounding circumstances had to be taken into account where a clause in the agreement was capable of more than one meaning. Evidence of surrounding circumstances would only be permissible if the certainty of an agreement cannot be gathered from language alone. In *De Kock v Hänel* 1999 (1) SA 994 (C) 998 it was held that when interpreting servitudes, the words must be given their ordinary grammatical meaning.
[64] In *De Kock v Hänel* 1999 (1) SA 994 (C), the court stated that if there should be any doubt as to whether a praedial or a personal servitude has been established, the rebuttable presumption that a personal servitude was created, will apply.
[65] Van der Merwe CG "Servitudes and other real rights" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 591-629 at 611; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 332.
[66] S 2(1) of the Prescription Act 18 of 1943; s 6 of the Prescription Act 68 of 1969; s 25 of The Constitution of the Republic of South Africa 1996 and ss 4 & 5 of the Expropriation Act 63 of 1975; National Water Act 36 of 1998; ss 28 & 31 Sectional Titles Act 95 of 1986; s 19 of the Electricity Act 41 of 1987.
[67] Van der Merwe CG "Servitudes and other real rights" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 591-629 at 611.
[68] S 63(1) of the Deeds Registries Act 47 of 1937.

Registries Act.[69] A servitude is registered against the title deed of the servient tenement to serve as a notice to the whole world of its existence.[70] The purpose and effect of registration is that the registered servitude will be enforceable against the owner of the servient tenement and all his successors in title.

If the agreement between the parties to create a servitude is not registered, the entitlements granted will result only in creditor's rights between the parties.[71] The effect of a servitude established by an unregistered agreement is that the entitlements are enforceable against the current owner only and not his successors in title.[72] In principle, third parties are not bound by the unregistered servitutal agreement concluded between the contracting parties. However, according to the doctrine of knowledge, a third party can be held liable to the terms of an agreement to which he was not a party.[73] The doctrine of knowledge will not be applicable before registration of the property in the name of a new owner.[74] The court held in *Wahloo Sand BK v Trustees, Hambly Parker Trust*[75] that the doctrine of notice will only be applicable in the case of an unregistered servitutal agreement where the property has been registered in the name of a new owner with knowledge of the servitutal agreement before date of transfer of the property.

Prior to the judgment in *Linvestment CC v Hammersley*[76] (*Linvestment*) the law required that mutual consent be obtained in order to relocate a registered specified servitude of right of way.[77] In *Linvestment* the registration of the servitude as well as the path of the right of way created a real right for the owner of the dominant tenement and his successors in title, which is not only enforceable against the owner of the servient

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[69] 47 of 1937.
[70] Van der Merwe CG "Servitudes and other real rights" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 591-629 at 612.
[71] Van der Merwe CG *Sakereg* (2nd ed 1989) 83-88; Van der Merwe CG & De Waal MJ *The Law of Things and Servitudes* (1993) para 43.
[72] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 334-336.
[73] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 335.
[74] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 334-336.
[75] 2002 (2) SA 776 (SCA).
[76] [2008] 2 All SA 493 (SCA).
[77] *Gardens Estate Ltd v Lewis* 1920 AD 144.

tenement but also against third parties.[78] The Supreme Court of Appeal in *Linvestment* created uncertainty by deciding that a specified servitude of right of way registered against the title deeds of property can be changed unilaterally. On an interpretation of the outcome in *Linvestment* it seems as though, despite the existence of a limited real right over the servient tenement, the owner of the servient tenement will continue to enjoy the exclusive use of his property.[79]

The implication of the Supreme Court of Appeal's decision, namely that servitudes can be relocated unilaterally, has the effect of defeating the purpose and effect of registration, and complicates the meaning and effect of a real right.[80]

2.3 Case law concerning servitudes of right of way

2.3.1 The legal position before the Supreme Court of Appeal's decision in Linvestment

2.3.1.1 Introduction

The previous section relating to the general principles of servitudes serves as a background discussion before addressing the main issue, namely whether a specified servitude of right of way may be relocated unilaterally.

Praedial servitudes are designed to survive generations of landowners.[81] Servitudes are usually created without considering the likelihood of future changed circumstances.[82] The law provided some measure of flexibility in situations where the servitude of right of way has been constituted generally (*simpliciter*).[83]

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[78] *Linvestment CC v Hammersley and Another* [2007] 3 All SA 618 (N) para 22; *Ex parte Rovian Trust (Pty) Ltd* 1983 (3) SA 209 (D).
[79] *Linvestment CC v Hammersley and Another* [2007] 3 All SA 618 (N) para 41.
[80] *Linvestment CC v Hammersley and Another* [2007] 3 All SA 618 (N) para 41.
[81] Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The Principles of The Law of Property in South Africa* (2010) 244.
[82] Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The Principles of The Law of Property in South Africa* (2010) 244.
[83] Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The Principles of The Law of Property in South Africa* (2010) 245.

The route over which a servitude of way is exercised may be specified by the terms of the servitude or it may be undefined.[84] It was stated in *Nach Investments (Pty) Ltd v Yaldai Investments (Pty) Ltd and Another*[85] that the determination of the route of the servitude is not essential in an agreement for the constitution of a right of way.[86] However, in *Grobbelaar v Freund*[87] it was held that the applicant must establish the nature and ambit of the servitude in a clear, unambiguous and objectively determinable way. If the servitude is constituted generally (*simpliciter*), the entire servient tenement will be subject to the servitude.[88] A servitude conferred *simpliciter* is described as a right of way, *via*, without the route and width of the road having been determined.[89] In such a case the owner of the dominant tenement will be entitled to select a particular route, provided that he does so *civiliter modo*.[90] Once the owner of the dominant tenement has selected a route, he may not change it without the consent of the owner of the servient tenement.[91] Voet states that if the route chosen by the dominant tenement proprietor is burdensome for the owner of the servient tenement, the owner of the servient tenement may suggest an alternative route which is equally convenient.[92] If the owner of the servient estate wishes to use his land over which the right of way is registered, for a good reason, for instance to build a house or to cultivate crops on the area, then the owner of the servient estate may relocate

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[84] Van der Merwe CG *Sakereg* (2nd ed 1989) 482; Van der Merwe CG & De Waal MJ "Servitudes" in Joubert WA (ed) *LAWSA* vol 24 (1) (2000) 321-363 at 333.
[85] 1987 (2) SA 820 (A).
[86] *Nach Investments (Pty) Ltd v Yaldai Investments (Pty) Ltd and Another* 1987 (2) SA 820 (A) at 830–832.
[87] 1993 (4) SA 124 (O) 130-131.
[88] See Van Leeuwen *RHR* 2 21 6; *Nach Investments (Pty) Ltd v Yaldai Investments (Pty) Ltd and Another* 1987 (2) SA 820 (A).
[89] "The notable example of a servitude *simpliciter* is servitude *via necessitate* which an owner can claim where it is necessary for him to have ingress or egress from his property by such way in order to reach a public road. Such servitude can be altered by the owner of the servient tenement, if he can afford to the owner of the dominant tenement another route as convenient as the old one." *Linvestment CC v Hammersley and Another* [2007] 3 All SA 618 (N) para 30, *Wayne v Pope* 1960 (3) SA 37 (C), *Van Rensburg v Coetzee* 1979 (4) SA 655 (A).
[90] *D* 8 1 9; Voet 8 3 8; *Laubscher v Rive & Others* (1866) 5 Searle 195; *Landman v Daverin* (1881-1882) 2 EDC 1; *Divisional Council of Kimberley v Executrix Testamentary of Sheasby* (1892) 6 HCG 167 at 173; *Smit v Russouw & Others* 1913 CPD 847; *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 619; *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467; *Reid v Rocher* 1946 WLD 294; *Nach Investments (Pty) Ltd v Yaldai Investments (Pty) Ltd and Another* 1987 (2) SA 820 (A).
[91] Van der Merwe CG *Sakereg* (2nd ed 1989) 483 cites Caepolla *De Servitutibus* 1 7; Christiniaeus *In Leges Municipales Mechlinienses* 14 50; *Fuchs v Lys* (1889-1890) 3 SAR 36 at 38; *Van Heerden v Coetzee & Others* 1914 AD 167; *Gardens Estate Ltd v Lewis* 1920 AD 144 at 150.
[92] Voet 8 3 8; *Allen v Colonial Government* (1907) 24 SC 1; *Rubidge v McCabe & Sons and Others, McCabe & Sons and Others v Rubidge* 1913 AD 433; *Smit v Russouw & Others* 1913 CPD 847; *Reid v Rocher* 1946 WLD 294 at 300.

the original route, provided that the owner of the dominant estate is not thereby prejudiced.[93] In *Allen v Colonial Government*[94] the court held that a right of way is not a fixed and defined concept like an erf of ground or a farm. Hence, it is a shifting concept and the area over which the servitude is located may be moved from time to time.[95]

Traditionally, the same flexibility did not apply to servitudes of right of way that have been specified. Prior to the judgment in *Linvestment*, the law required that mutual consent be obtained in order to relocate a specified servitude of right of way.[96] Voet did not specify whether the abovementioned legal principle regarding the relocation of servitudes constituted generally applies to a registered servitude of right of way. It is also questionable whether the owner of the servient tenement enjoys a similar right, namely to relocate a servitude if it becomes burdensome for him, even in the case where the servitude has been registered. The following section will focus on how South African case law prior to the Supreme Court of Appeal judgment in *Linvestment* interpreted the common law principle as stated by Voet[97] in his commentary on the Pandects.

2.3.1.2 Rubidge v McCabe & Sons and Others, McCabe & Sons and Others v Rubidge

In this case, a right of way was located over the servient tenement belonging to Rubidge (defendant).[98] McCabe (plaintiff) as owner of the dominant tenement was allowed to make use of the right of way. In their declaration, the plaintiffs set out that from time immemorial there had run over defendants' farm, a common and public road or *via vicinalis*.[99] The

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[93] *Reid v Rocher* 1946 WLD 294 at 300.
[94] (1907) 24 SC 1 at 7.
[95] (1907) 24 SC 1 at 7.
[96] *Gardens Estate Ltd v Lewis* 1920 AD 144.
[97] Voet 8 3 8.
[98] *Rubidge v McCabe & Sons and Others, McCabe & Sons and Others v Rubidge* 1913 AD 433.
[99] "The most convenient way of dealing with rights of way is to classify them as public and private, for where roads are concerned the distinction between urban and rural servitudes does not apply. Only rural roads are dealt with under the heading of public rights of way." See Hall CG *Servitudes* (3rd ed 1973) 49. In the past, public servitudes were reserved (most commonly in state grants) in favour of the public in general or for a portion of it. Examples of such rights are the right of outspan, the right to use trek-paths on a particular tenement. Public servitudes are not regarded as praedial because they are not constituted in favour of a dominant tenement. Neither are they personal, because they are not constituted in favour of a particular person. See Van der Merwe CG and De Waal MJ *The Law of Things and Servitudes* (1993) para 286. In the past there was a distinction between two kinds of public roads, namely *via publica* and *via vicinalis.* See *Peacock v Hodges* (1876) Buch 65; *Du Toit v Aberdeen Divisional Council* 1910 CPD 477 at 481; *Viljoen v Strydom* 1910 CPD 176 at 178: "A *via publica* is a road which has been proclaimed as a public road by an

owners of the farms now owned by the plaintiffs and other persons were enabled, either on foot or horseback, or with stock and vehicles to use the road. The plaintiffs and their predecessors in title had for a period exceeding thirty years openly, peacefully, continuously and adversely made use of the road.[100] In 1887 the parties consented to the deviation of the original right of way to run along a line known as the Blaauwkop Road. This new road was used in the same manner as had been the original road until 1904. The defendant later constructed a weir on the servient tenement without the consent of the plaintiffs, which rendered it impossible for the owner of the dominant tenement to exercise his entitlements with regard to the drift. The construction of this weir was unlawful. As a result of the plaintiffs' disapproval of the relocation of the route, a further deviation of the course of the road was agreed upon. This road was used in the manner previously described until 1911. In 1911, the defendant constructed a second weir without the consent of the plaintiff, in such a place that it became impossible to use the drift safely. At the time of construction of this weir the defendant, also without consulting the plaintiffs, made a further deviation of the route. This drift was also impracticable and unsafe to use for the defendant. The defendant proposed to take certain steps which were essential for the safe use of this drift. However, the defendant failed to take the necessary steps to make the use of the proposed drift safe. Therefore, the plaintiffs protested against the defendants' wrongful acts and required the restoration of the original road. Subsequently, the defendants negotiated with the plaintiffs and offered to make a further deviation of the road. The terms and conditions of this offer were embodied in a certain note of understanding. This declaration alleged that the plaintiffs accepted this offer but the defendant had wrongfully refused to execute the note of understanding or to carry out his

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authority empowered by statute or ordinance to do so. A *via vicinalis* is a right of way which the public becomes entitled to use through immemorial user. Two other methods of creating public rights of way exist, namely by reserving them in Crown or State grants of land and through the owner of the land dedicating a road which crosses his property to public use. A *via vicinalis* is not a public road in the full sense of *via* publicae because they were not established by competent authority." See Hall CG *Servitudes* (3rd ed 1973) 50: "The existence of a public servitude can be asserted by proving vetustas or immemorial user. In terms of this doctrine there is a rebuttable presumption that where a public servitude has been exercised by members of the public from time immemorial, such servitude arose by virtue of a valid title even though there is no written proof of the validity of the title." See Van der Merwe CG & De Waal MJ *The Law of Things and Servitudes* (1993) para 288. If this particular route was a public right of way as contended by the dominant owner and if the particular route was a declared road under the National Roads Act, then deviation of the route by the local authorities in control of them will not be authorised without the consent in writing of the National Roads Board (s 12 *National Roads Act* 42 of 1935). See Hall CG *Servitudes* (3rd ed 1973) 60-64.

[100] *Rubidge v McCabe & Sons and Others, McCabe & Sons and Others v Rubidge* 1913 AD 433 at 434.

obligations. The defendant admitted to some of the allegations made by the plaintiff, but denied that he had accepted or agreed to the terms and conditions in the note of understanding. Furthermore, the defendant denied that he made an offer to that effect.

The trial court held that a servient owner will be able to relocate a servitude when circumstances arise that will make it advantageous to the servient tenement, provided that the servient owner grants an alternative route to the dominant owner that is equally suitable. The trial court held that the plaintiffs are entitled to a road along a route which is convenient for them to use, in place of a servitude road, which had been rendered impracticable by the acts of the appellant. Furthermore, the court *a quo* ordered the defendant to construct along the proposed route a safe, practicable and convenient road and drift. As a result of this judgment, the defendants appealed against the judgment reached in the trial court and a cross-appeal was brought by the plaintiffs.

The Appellate Division confirmed the decision of the Cape Provincial Division, but with modifications. The legal questions raised in the Appellate Division were whether a servitude was established and whether and when the course of the road can be diverted. To begin with, Lord De Villiers CJ determined whether a servitude of right of way was established between the parties. Lord De Villiers CJ stated that if the plaintiffs were entitled to the right of way, they had every ground for objecting to the weir if the effect of its construction was to subject them to the risk of mishaps.[101] Lord De Villiers CJ came to the conclusion that the plaintiffs had acquired a right of way based on the evidence before the court. According to Lord De Villiers CJ, the plaintiffs acquired a right of way by prescription over the defendant's farm to the main road.[102] Lord De Villiers CJ said that the mere fact that there have been deviations from time to time would not prevent the creation of such a servitude.[103] It has been contended that the road was a *via necessitatis*, but the plea did not say so.[104] According to Lord De Villiers CJ, it is possible that the right of way was first used because the owners of the plaintiffs' farms had no other means of approach to the outer world.[105] The original diagrams of the farms showed traces of roads from these

[101] *Rubidge v McCabe & Sons and Others, McCabe & Sons and Others v Rubidge* 1913 AD 433 at 440.
[102] *Rubidge v McCabe & Sons and Others, McCabe & Sons and Others v Rubidge* 1913 AD 433 at 442.
[103] *Rubidge v McCabe & Sons and Others, McCabe & Sons and Others v Rubidge* 1913 AD 433 at 442.
[104] *Rubidge v McCabe & Sons and Others, McCabe & Sons and Others v Rubidge* 1913 AD 433 at 442.
[105] *Rubidge v McCabe & Sons and Others, McCabe & Sons and Others v Rubidge* 1913 AD 433 at 442.

farms over the defendant's property.[106] Therefore, it was not denied that during the long intervening period the right had been continuously and peacefully exercised.[107] Lord De Villiers CJ held that the legal position is that a servitude existed. Lord Solomon J stated that the evidence did not establish that there was a public road over the farm, but rather that a servitude of right of way existed.[108] With regard to the questions whether and when the course of the road could be diverted, the Court held that the owners of the dominant tenement must exercise their rights in the manner least oppressive to the defendant.[109] Further, as owner of the servient tenement the defendant held the right, after due notice to the plaintiffs to divert the course, provided that the diversion did not make the use of the road less convenient or more expensive to the plaintiffs.[110]

In this case the diversion of the route made by the defendant was unsuitable and inconvenient. The defendants interfered with the rights of the plaintiffs by diverting the course of the road without consulting them. The defendant should at least have consulted with the plaintiff about his intention to relocate the servitude.

As soon as the plaintiffs became aware of the fact that the weir was being constructed, they sought an interview with the defendant in order to inform him of the possible prejudice that the construction would cause. It is also clear from the evidence that the plaintiffs had a reasonable attitude and they showed every disposition to meet the defendant's convenience and merely asked for a road over the defendant's property which was equally suitable to the one they had enjoyed.[111] After long negotiations, a new drift was constructed and proved quite satisfactory until the defendant constructed another weir. As a result of the construction of the weir, the drift became impassable.

The contracting parties gave consent to the first diversion of the fixed route. However, the second route was never mutually agreed upon by the parties. It was stated by Lord De

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[106] *Rubidge v McCabe & Sons and Others, McCabe & Sons and Others v Rubidge* 1913 AD 433 at 442.
[107] *Rubidge v McCabe & Sons and Others, McCabe & Sons and Others v Rubidge* 1913 AD 433 at 442.
[108] *Rubidge v McCabe & Sons and Others, McCabe & Sons and Others v Rubidge* 1913 AD 433 at 446.
[109] *Rubidge v McCabe & Sons and Others, McCabe & Sons and Others v Rubidge* 1913 AD 433 at 442.
[110] *Rubidge v McCabe & Sons and Others, McCabe & Sons and Others v Rubidge* 1913 AD 433 at 441.
[111] *Rubidge v McCabe & Sons and Others, McCabe & Sons and Others v Rubidge* 1913 AD 433 at 451.

Villiers CJ, that in the absence of a definite agreement, the plaintiffs could not be expected to accept a road with these disadvantages.[112]

The owner of the servient tenement had credible motives when he interfered with the rights of the owners of the dominant tenement without their consent.[113] The object of the owner of the servient tenement in making the new weir was to obtain further supplies of water for irrigation purposes, but the court held that he could not be allowed to attain his objects at the expense of the rights of others.[114]

The case illustrates that a servient owner will be able to relocate a servitude when circumstances arise that will make it advantageous to the servient tenement, provided that the servient owner grants an alternative route to the dominant owner that is equally suitable. It is also clear from this case that should a landowner relocate a servitude, he should give due notice to the dominant owners about his intentions.[115] Furthermore, the case illustrates that if a right of way is claimed by prescription the fact that there have been deviations of the road for the convenience of and with the concurrence of the owners of the servient and dominant tenements, does not constitute an interruption of the user, and thus does not prevent the acquisition of a servitude.[116] It is important to note that the servitude was constituted generally and that the servitude was not specified. The court confirmed Voet's statement without saying anything about a specified right of way.

2.3.1.3 Van Heerden v Coetzee and Others

The plaintiff, Coetzee, was the owner of the servient tenement Uitkijk; the defendant was the owner of the adjoining dominant tenement Weltevreden.[117] Initially the two tenements belonged to one Van Wijk. Van Wijk sold Weltevreden in 1897. On the diagram attached to the title deed of Weltevreden was a watercourse running through both Weltevreden and Uitkijk with the following words: "[t]he dam A is the property of the owner of Weltevreden,

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[112] *Rubidge v McCabe & Sons and Others, McCabe & Sons and Others v Rubidge* 1913 AD 433 at 443.
[113] *Rubidge v McCabe & Sons and Others, McCabe & Sons and Others v Rubidge* 1913 AD 433 at 451.
[114] *Rubidge v McCabe & Sons and Others, McCabe & Sons and Others v Rubidge* 1913 AD 433 at 443.
[115] *Rubidge v McCabe & Sons and Others, McCabe & Sons and Others v Rubidge* 1913 AD 433 at 442.
[116] *Rubidge v McCabe & Sons and Others, McCabe & Sons and Others v Rubidge* 1913 AD 433 at 441. See Hall CG *Servitudes* (3rd ed 1973) 50.
[117] *Van Heerden v Coetzee and Others* 1914 AD 167.

who has the right to a water furrow through the veld of Uitkijk, while he also had the right to take building materials in the veld of Uitkijk, to repair the dam."[118] However, it stated that he could not make the dam so large that the water rises in the cultivated land of Uitkijk. Before the sale of Weltevreden, Van Wijk had built a dam at a spot (A). This dam broke in 1898 and was repaired. It broke again in 1901 and after that was not repaired.

The plaintiff bought Uitkijk in 1903 and the defendant acquired Weltevreden in 1908. In his declaration, the plaintiff maintained that the defendant had wrongfully made and repaired a new dam and furrow.

The plaintiff sought a declaratory order requiring the defendant to remove the new dam and to fill up all holes, trenches and furrows made by him. The plaintiff sought an interdict prohibiting the defendant from making or using any dam or furrow on the plaintiff's farm other than the dam at point A. The legal question raised in this case was whether the owner of the dominant tenement is entitled to discard the original bank and erect another bank.[119]

The trial court held that the owner of the dominant tenement could not relocate the servitude agreed upon.[120] It was as a result of this decision that the defendant appealed against the court's decision. The defendant was ordered to remove the new dam made by him and to cease using the water therein and the furrow.[121]

The Appellate Division held that a servitude must be construed in the manner which is least onerous to the servient tenement.[122] The court stated that where a servitude is given in general terms and the owner of the dominant tenement has chosen the spot where he will exercise it, he has made his selection and cannot change it afterwards.[123]

It was stated in *Van Heerden v Coetzee*[124] that the building of the new dam has made the servitude more onerous because more material will be required for building and repairing two dams rather than one, a longer furrow will be required, a longer right of way will be

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[118] *Van Heerden v Coetzee and Others* 1914 AD 167 at 168.
[119] *Van Heerden v Coetzee and Others* 1914 AD 167 at 172.
[120] *Van Heerden v Coetzee and Others* 1914 AD 167 at 170.
[121] *Van Heerden v Coetzee and Others* 1914 AD 167 at 168.
[122] *Van Heerden v Coetzee and Others* 1914 AD 167 at 170.
[123] *Van Heerden v Coetzee and Others* 1914 AD 167 at 169.
[124] *Van Heerden v Coetzee and Others* 1914 AD 167 at 170.

necessary, the new dam is causing the stream to develop into a donga and it is altering the flow of the donga. The judge also stated that where a particular dam is indicated as the subject of the servitude, the owner of the servient tenement is entitled to say that the site of the dam shall not be altered without his consent even if it is not shown that the alteration would prejudice him.[125] As owner of the land, he is the person to decide whether any departure from the terms of the servitude shall be allowed.[126] It was held that the owner of the servient tenement is entitled to hold the owner of the dominant tenement strictly to the terms of the instrument creating the servitude, and if the element of prejudice is to be introduced at all, the onus of proving such prejudice does not lie with him.[127]

This case illustrates the importance of the rule that a servitude must be construed in the manner which is least onerous to the servient tenement. Furthermore, the case illustrates that where a servitude is given in general terms and the owner of the dominant tenement has chosen the spot where he will exercise it, he has made his selection and cannot change it afterwards.[128] Similar to the previous case, this case confirms the principles of Voet but it is silent regarding a specified servitude of right of way.

2.3.1.4 Gardens Estate Ltd v Lewis

In 1877 the defendant's predecessor in title, PJ Kotze, sold and transferred to the plaintiff's predecessor in title, J de Smidt, a portion of his land.[129] The transfer was stated to be subject to certain conditions which read as follows: "PJ Kotze reserves to himself six feet of ground on both sides of the pipes and twenty decimal seventy five feet by forty five feet at the heads of spring as shown on the diagram."[130] It also stated that J de Smidt had a right of free access either to walk or drive across the reserve as far as the pipes were laid and also to lay pipes at any time across said reserve without disturbing or injuring the pipes of the proprietor of the reserve. Furthermore, it stated that J de Smidt would refrain from digging around the springs and making use of the water from the springs.

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[125] *Van Heerden v Coetzee and Others* 1914 AD 167 at 172.
[126] *Van Heerden v Coetzee and Others* 1914 AD 167 at 173.
[127] *Van Heerden v Coetzee and Others* 1914 AD 167 at 173.
[128] *Van Heerden v Coetzee and Others* 1914 AD 167 at 169.
[129] 1920 AD 144.
[130] *Gardens Estate Ltd v Lewis* 1920 AD 144 at 147.

The dispute related to the meaning of the condition mentioned above. The (appellant/plaintiff) Gardens Estate, who was the successor in title to J de Smidt, claimed to be the owner of the whole portion, including the land on which the spring and the pipes were laid. The appellant maintained that the defendant, the successor in title of PJ Kotze, was only entitled to a servitude of *aqueductus*. The defendant contended that he was the owner of the area reserved and that the right of access of J de Smidt mentioned in the transfer was merely a personal servitude in favour of J de Smidt which could not be transmitted.

The original pipeline was relocated by the Gardens Estate Syndicate without the consent of the defendant and without any notice to him. When this came to the knowledge of the defendant he protested against it and he re-laid the pipes along the original course, maintaining that as owner of the ground he was entitled to do so. According to him, the personal servitude in favour of J de Smidt was no longer in force.

The legal question was whether the ownership in the reserved portion remained in the defendant or whether it passed to the plaintiff, in which case the defendant only acquired a servitutal right. A further question was whether the plaintiffs had the right to relocate the pipeline. The trial court held that the intention and effect of the reservation in the Deed of Transfer from PJ Kotze to J de Smidt, was to retain in PJ Kotze ownership of the portion reserved, subject to a servitude of access in favour of J de Smidt and his successors in title.[131] As a result of this order, the plaintiff noted an appeal, and the defendant cross-appealed to that portion of the order in which it was held that the right of access of J de Smidt passed to his successors in title.[132]

In the Appellate Division, the court held that it followed that what PJ Kotze sold and what he transferred to J de Smidt was the entire portion of land, including the reserved area.[133] This was not only clear from the extent of land transferred, but also from the deed itself.[134] In it PJ Kotze declared "[t]hat he had truly and legally sold [the property] and that he did by

[131] *Gardens Estate Ltd v Lewis* 1920 AD 144 at 148.
[132] *Gardens Estate Ltd v Lewis* 1920 AD 144 at 148.
[133] *Gardens Estate Ltd v Lewis* 1920 AD 144 at 148.
[134] *Gardens Estate Ltd v Lewis* 1920 AD 144 at 148.

these presents cede and transfer in full and free property to and on behalf of J de Smidt a certain piece of ground".[135]

The respondent contended that the deed must be read as a whole. If read as a whole it became clear that although in the first portion of the document PJ Kotze purported to have sold and transferred to J de Smidt the whole portion, including the reserved area, the language used in the condition showed that PJ Kotze intended to retain the ownership in the strip for himself and merely to create a personal servitude on it in favour of J de Smidt. The judge argued that if it was the intention of PJ Kotze to retain ownership in the specific area, he should not have passed transfer of the whole.[136] The judge also mentioned that if it was the intention of PJ Kotze to exclude the reserved area, he should not have included the reserved area in the portion transferred.[137] In addition, it was said that it was too late to attempt to rectify the Deed of Transfer.[138]

With regard to the second legal question, namely whether the plaintiffs were allowed to relocate the original pipeline, the court held that the Gardens Estate Syndicate had no right to do so.[139] The court drew a clear distinction between a duly constituted servitude and a servitude created in general.[140] The court held that a specified servitude could only be relocated by obtaining mutual consent.[141] Voet states that the owner of the dominant tenement has the choice of where to lay the line, which must be exercised *civiliter modo*.[142] Once he has exercised his election, the owner of the dominant estate cannot relocate the servitude. According to Voet, the owner of the servient estate may relocate the servitude provided that the newly elected route is as convenient as the former route.[143] The judge stated that when Voet speaks of the owner of the servient tenement having a right to point out another route to that which has been agreed upon, he speaks of servitudes created *simpliciter*.[144] It followed that the Gardens Estate Syndicate had no right

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[135] *Gardens Estate Ltd v Lewis* 1920 AD 144 at 149.
[136] *Gardens Estate Ltd v Lewis* 1920 AD 144 at 149.
[137] *Gardens Estate Ltd v Lewis* 1920 AD 144 at 149.
[138] *Gardens Estate Ltd v Lewis* 1920 AD 144 at 149.
[139] *Gardens Estate Ltd v Lewis* 1920 AD 144 at 150.
[140] *D* 8 1 9.
[141] *Gardens Estate Ltd v Lewis* 1920 AD 144 at 150.
[142] Voet 8 3 8.
[143] Voet 8 3 8.
[144] *Gardens Estate Ltd v Lewis* 1920 AD 144 at 150.

to relocate the pipeline without obtaining the consent from the owner of the dominant tenement.

It is clear from this judgment that the owner of the servient estate will not be allowed to relocate a registered or a specified servitude of right of way. If the servitude is defined *ab initio*, it can only be changed by mutual consent.[145] If the servitude is undefined, the owner of the dominant tenement may choose a particular route.[146] Once he has chosen a route, he may not change the route without obtaining the necessary consent of the owner of the servient tenement. The servient owner may require the owner of the dominant land to follow another equally convenient route, if the route chosen by the dominant owner is particularly onerous to him.[147]

2.3.1.5 Linvestment CC v Hammersley and Another

The *Linvestment* case concerns a praedial servitude as discussed in 2.2 above.[148] The appellant's property was subjected to two registered servitudes, namely a defined right of way as reflected in the diagrams registered in the Deeds Office,[149] in favour of the first respondent's property. The appellant had given notice to the first respondent of his intention to amend the course of the servitude. As a result of the respondent's refusal to accept the alternative route, the appellant claimed an order declaring that he was entitled to substitute the proposed servitude's route for the existing route. The traditional legal principle regarding the relocation of servitudes, as stated in *Gardens Estate*,[150] is that the

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[145] *Fuchs v Lys* (1889-1890) 3 SAR 36 at 38; *Van Heerden v Coetzee & Others* 1914 AD 167; *Gardens Estate Ltd v Lewis* 1920 AD 144 at 150. See Van der Merwe CG & De Waal MJ *The Law of Things and Servitudes* (1993) para 229.

[146] *Laubscher v Rive & Others* (1866) 5 Searle 195; *Landman v Daverin* (1881-1882) 2 EDC 1; *Divisional Council of Kimberley v Executrix Testamentary of Sheasby* (1892) 6 HCG 167 at 173; *Smit v Russouw & Others* 1913 CPD 847; *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 619; *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467; *Reid v Rocher* 1946 WLD 294; *Nach Investments (Pty) Ltd v Yaldai Investments (Pty) Ltd and Another* 1987 (2) SA 820 (A). See Van der Merwe CG & De Waal MJ *The Law of Things and Servitudes* (1993) para 229.

[147] Voet 8 3 8; *Allen v Colonial Government* (1907) 24 SC 1 at 7; *Rubidge v McCabe & Sons and Others, McCabe & Sons and Others v Rubidge* 1913 AD 433; *Smit v Russouw & Others* 1913 CPD 847; *Reid v Rocher* 1946 WLD 294 at 300. See Van der Merwe CG & De Waal MJ *The Law of Things and Servitudes* (1993) para 229.

[148] *Linvestment CC v Hammersley and Another* [2007] 3 All SA 618 (N).

[149] Chadwick I "SCA rules servitudes can change – *Linvestment CC v Hammersley and Another"* (2008) Jul *De Rebus* at 42-43.

[150] *Gardens Estate Ltd v Lewis* 1920 AD 144.

location of a specified or definite servitude could only be altered by mutual consent. The legal question raised in *Linvestment* was "[w]hether the owner of a servient tenement can in his own volition, change the route of a defined right of way registered against the title deeds of property."[151] The court *a quo* decided this question in the negative. In order to support its decision, the judge in *Linvestment* relied on the *Gardens Estate*[152] judgment in which the court held that in order for the owner of the servient tenement to alter a registered praedial servitude, he must first obtain the consent of the dominant owner before effecting the intended alterations.[153] The court *a quo* also referred to *Ex parte Florida Hills Townships Ltd*[154] in which Rumpff JA said that once the praedial servitude has been legally established, no court has the jurisdiction to come to the assistance of a party merely because he wants the terms of the servitude changed for his own benefit.

Furthermore, Madondo JA relied on *Ex parte Uvongo Borough Council and Another*[155] and *Ex parte Rovian Trust (Pty) Ltd*[156] where it was held that in a situation where the right of another owner of property is endorsed against the title of the property, such a right cannot be destroyed without the consent of the owner. Madondo JA also relied on *Ex Parte Optimal Property Solutions CC*[157] which stated that the one who objects to the relocation of the servitude does not have to motivate his objection or demonstrate that his objection is not unreasonable. Additionally, it was said that it is not the function of the courts to unilaterally and without the consent of the affected party, make or break the contract.[158]

Madondo JA also said that the unilateral alteration of the registered servitude will infringe upon the proprietary rights of the owner of the dominant tenement.[159] Granting an order which allows the unilateral relocation of a servitude will defeat the purpose and effect of registration.[160] It would also complicate the meaning, interpretation and effect of a real right.[161] He also said that the approval of such relocation would mean that the owner of the

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[151] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 1.
[152] *Gardens Estate Ltd v Lewis* 1920 AD 144.
[153] *Linvestment CC v Hammersley and Another* [2007] 3 All SA 618 (N) para 41.
[154] *Ex Parte Florida Hills Townships Ltd* 1968 (3) SA 82 (A) 253-254.
[155] 1966 (1) SA 788 (N) 790.
[156] 1983 (3) SA 209 (D) 213.
[157] 2003 (2) SA 136 (C) 139.
[158] *Ex Parte Optimal Property Solutions CC* 2003 (2) SA 136 (C) 139.
[159] *Linvestment CC v Hammersley and Another* [2007] 3 All SA 618 (N) para 41.
[160] *Linvestment CC v Hammersley and Another* [2007] 3 All SA 618 (N) para 41.
[161] *Linvestment CC v Hammersley and Another* [2007] 3 All SA 618 (N) para 41.

servient tenement would continue to enjoy the exclusive use of his property and the right to do with his property as he pleased, despite the existence of a registered limited real right over his property.[162]

The court *a quo* decision was decided in line with the *Gardens Estate* case, namely that the servient owner should first obtain mutual consent before he may relocate the servitude registered over the servient tenement.[163]

2.4 The Supreme Court of Appeal decision in Linvestment CC v Hammersley and Another

The traditional legal principle regarding the relocation of servitudes, as stated in *Gardens Estate Ltd v Lewis*[164] is that a specified or definite servitude could only be relocated by mutual consent. As the analysis of earlier case law above demonstrates, this principle had been accepted as applicable law in South Africa for more than 80 years.[165]

The legal question raised in *Linvestment* was "[w]hether the owner of a servient tenement can in his own volition change the route of a defined right of way registered against the title deeds of property".[166] As was indicated above, the trial court decided, in line with the position established in earlier case law, that the owner of the servient tenement may not change the route of a specified right of way unilaterally.

The Supreme Court of Appeal in *Linvestment* overturned the decision of the trial court and decided the legal question in the affirmative, holding that the owner of a servient tenement can unilaterally change the route of a defined right of way. In doing so, a long-established precedent relating to servitudes based on the grounds of convenience and equity was overturned. The South African legal system recognises the doctrine of *stare decisis* and the court in *Linvestment* acknowledged the *Gardens Estate*[167] judgment. The Supreme Court of Appeal mentioned that unless there is a valid reason to distinguish or depart from

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[162] *Linvestment CC v Hammersley and Another* [2007] 3 All SA 618 (N) para 41.
[163] *Gardens Estate Ltd v Lewis* 1920 AD 144 at 150.
[164] 1920 AD 144 at 150.
[165] Chadwick I "SCA rules servitudes can change – *Linvestment CC v Hammersley and Another"* (2008) Jul *De Rebus* at 42-43.
[166] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 1.
[167] *Gardens Estate Ltd v Lewis* 1920 AD 144.

the conclusion in *Gardens Estate* the appeal must fail.[168] In the end the court decided that there were valid reasons for departing from the traditional position. The problem with the *Linvestment* judgment is that the court made a striking change to the common law on the basis of arguably insufficient historical and comparative argument.

The court relied on historical, comparative and policy reasons to justify the departure from the traditional common law principle. In the first place, it was inferred in *Linvestment* that the court in *Gardens Estate* may have been mistaken as to the state of South African law relating to servitudes and that for this reason the traditional legal principles regarding relocation of servitudes needed to be reconsidered.[169] The court decided that *Gardens Estate* was founded on the unstated but incorrect premise that the law expounded by Voet correctly reflected the common law of South Africa at the time when the judgment was written in 1920.[170] Heher AJ considered historical observations in *Linvestment*,[171] with the purpose to ascertain what might have happened between the time when Voet wrote his commentary and the time of the *Gardens Estate* case. The court provided historical arguments to justify its reconsideration of the traditional legal principles regarding relocation of servitudes as stated in the *Gardens Estate* case. The court in *Linvestment*[172] referred to a historical draft of a new draft code of law by Professor JM Kemper of Leiden, which was not available to the judges at the time of the *Gardens Estate* judgment.[173] According to Heher AJ, this draft was an authoritative statement of the Roman-Dutch private law at the date of the British occupation of the Cape and it contained principles which should have been applied in *Gardens Estate*.[174] The court concluded that it would be wrong to adhere blindly to an inference drawn from the views of Voet expressed at the end of the 17th century and that the additional information it had available indicated that a different approach could be followed. However, as is indicated below, the court's assessment of and reliance on the Kemper draft was misplaced.

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[168] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 13.
[169] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 22; Chadwick I "SCA rules servitudes can change – *Linvestment CC v Hammersley and Another*" (2008) Jul *De Rebus* 42-43.
[170] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) paras 22-23.
[171] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) paras 22-24.
[172] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 23.
[173] Chadwick I "SCA rules servitudes can change – *Linvestment CC v Hammersley and Another*" (2008) Jul *De Rebus* at 42-43; *Linvestment v Hammersley* [2008] 2 All SA 493 (SCA) paras 23-24.
[174] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 24.

The historical reasons for the decision are insufficient because Heher AJ relied on a draft civil code which never formed part of the received Roman-Dutch law in South Africa, while rejecting arguments based on a text of Voet, which does form part of received Roman-Dutch law. The *Linvestment* court stated that the court in *Gardens Estate* was mistaken as to the state of South African law relating to servitudes when the judgment was written and that the court should have applied the Roman Dutch principles set out in the draft civil code drafted by Professor JM Kemper in 1816. However, the legal historical argumentation upon which the court based this conclusion is problematic. The court's reliance on the abovementioned draft and the conclusions the court reached on the applicable law consequently requires further investigation in view of the principles of reception and the state of the law at the time when Roman-Dutch law was received in the Cape.

The laws of Holland were received in the Cape during the period of Dutch colonisation in 1652-1795 (as well as briefly during the period of 1803-1806, but no real legal development occurred during this short time).[175] In 1809 Roman-Dutch law was abolished in Holland.[176] When the Roman-Dutch law was abolished, the *Wetboek Napoleon ingerigt voor het Koninkrijk Holland* came into force.[177] In 1811 it was replaced by the *Code Civil*.[178] In 1815 it was decided to replace the *Code Civil* with a truly Dutch Code.[179] Professor JM Kemper was the person principally charged with the preparation of the Civil Code.[180] Professor JM Kemper's draft civil code of 1820 (a revised version of an earlier draft of 1816) amounted to an embodiment of pure Roman-Dutch law in its final stage of development.[181] However, the draft civil code of Professor JM Kemper was rejected by the legislature because the Belgian members wanted to retain the *Code Civil*.[182] When

[175] Hahlo HR & Kahn E *The South African Legal System and its Background* (1968) 567; Fagan E "Roman-Dutch law in its South African historical context" in Zimmerman R & Visser D (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 33-64 at 39.
[176] Hahlo HR & Kahn E *The South African Legal System and its Background* (1968) 564.
[177] Hahlo HR & Kahn E *The South African Legal System and its Background* (1968) 564.
[178] Hahlo HR & Kahn E *The South African Legal System and its Background* (1968) 564.
[179] Hahlo HR & Kahn E *The South African Legal System and its Background* (1968) 564.
[180] Hahlo HR & Kahn E *The South African Legal System and its Background* (1968) 564.
[181] Hahlo HR & Kahn E *The South African Legal System and its Background* (1968) 564.
[182] Hahlo HR & Kahn E *The South African Legal System and its Background* (1968) 564.

Belgium became independent it was too late to start all over again.[183] The Dutch *Burgerlijk Wetboek* of 1838 was consequently substantially modelled on the *Code Civil*.[184]

If the abovementioned historical development is taken into consideration it becomes clear that Heher AJ could not rely on the 1816 draft of the Dutch civil code of Professor JM Kemper as authority, since it never formed part of the 17th and 18th century Roman-Dutch law received in South Africa prior to 1806. Secondly, the draft civil code formed part of the post-Napoleonic development of Dutch law, which was no longer Roman-Dutch law in the sense that we inherited it.[185] The *Code Civil* brought an end to Roman-Dutch law in its country of origin.[186] Thirdly, the draft civil code of Professor JM Kemper was never official law in the Netherlands.[187]

The court further relied on comparative law to reach the conclusion that servitudes may be relocated if it is in the interest of fairness, equity and justice.[188] Additionally, section 173 of the 1996 Constitution which entitles the courts to develop the common law was relied upon in deciding to change the situation. The problem is that the comparative sources referred to are mostly secondary, without any contextual evidence to show how and why the foreign jurisdictions follow a flexible approach to the relocation of specified servitudes. In chapter 3 I reconsider the evidence from a number of the foreign jurisdictions mentioned by the court (the Netherlands, Germany, Scotland, the US and England) to assess the weight of the foreign law relied on by the court.

Heher AJ also stated that he was persuaded that the interests of justice required a change in South African established law on the subject.[189] The Supreme Court of Appeal stated that it would be indefensible to allow the rigid enforcement of a servitude in which the

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[183] Hahlo HR & Kahn E *The South African Legal System and its Background* (1968) 564.
[184] Hahlo HR & Kahn E *The South African Legal System and its Background* (1968) 564, Van Kan J "Het Burgerlijk Wetboek en de Code Civil" in Scholten P & Meijers EM (eds) *Gedenkboek Burgerlijk Wetboek 1838-1938* (1938) 243-275 at 243.
[185] "The Dutch *Burgerlijk Wetboek* of 1838, though by no means a copy of it, was substantially modelled on the *Code* Civil": Hahlo HR & Kahn E *The South African Legal System and its Background* (1968) 564.
[186] Hahlo HR & Kahn E *The South African Legal System and its Background* (1968) 564.
[187] The draft civil code of 1820 constituted a distillation of pure Roman-Dutch law in its final stage of development. This draft civil code by Kemper was rejected by the legislature, because it was opposed by the Belgian members, who wanted the *Code Civil*: Hahlo HR & Kahn E *The South African Legal System and its Background* (1968) 564.
[188] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) paras 27-29.
[189] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 31.

sanctity of the contract benefits neither party, but on the contrary, operated to the prejudice of one of them.[190] In chapter 5 I assess the policy reasons for the decision.

The court therefore granted the declaratory order sought, namely that an existing servitude right of way may be altered provided that the servient owner will be materially inconvenienced in the use of his property if the status *quo* is maintained, that the relocation will not prejudice the owner of the dominant tenement, and that the servient owner pays all costs incurred in the relocation of the servitude.[191]

2.5 Conclusion

The South African legal position regarding the relocation of servitudes can be summarised as follows: The traditional legal principle regarding the relocation of servitudes, as stated in *Gardens Estate v Lewis*,[192] is that a specified or definite servitude could only be relocated by mutual consent. The importance of the *Linvestment*[193] case is that the court decided that the owner of a servient tenement can unilaterally change the route of a defined right of way. In doing so the court overturned a long-established precedent relating to servitudes based on the grounds of convenience and equity. An existing servitude of right of way may be altered provided that the servient owner will be materially inconvenienced in the use of his property if the status *quo* is maintained, that the relocation will not prejudice the owner of the dominant tenement, and that the servient owner pays all costs incurred in the relocation of the servitude.[194]

The judgment creates uncertainty in law and confirms the possibility for courts to trump long-established principles. Although the policy reasons for the decision were strong, the court could have provided more comprehensive comparative justification, while its historical argument was misplaced. The comparative analysis can be regarded as problematic because Heher AJ relied on secondary sources in order to support his

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[190] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 31.
[191] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 35.
[192] 1920 AD 144.
[193] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA).
[194] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 35.

argument without discussing their comparative context.[195] The following chapter aims to provide a more contextual comparative legal background analysis of the Dutch, German, US, Scots and English legal positions pertaining to the unilateral relocation of a specified servitude of right of way.

[195] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) paras 27-29.

Chapter 3: Comparative Analysis

3.1 Introduction

Section 39(1)(c) of the Constitution provides that, when developing the common law, the courts may consider foreign law. The court in *Linvestment CC v Hammersley*[1] (*Linvestment*) decided the case in line with the international trend to follow a more flexible legal approach which allows for unilateral relocation of even specified servitudes. The problem with the methodology of this decision is that the court never did a proper, in-depth legal background analysis of foreign law in order to support its argument. Instead of using primary sources, the court used only secondary sources, without any discussion of their comparative value or context. In the absence of a more contextual analysis that reveals the reasons for and the context within which foreign jurisdictions follow a more flexible approach, the court's comparative reasoning is therefore insufficient.

The aim of this chapter is to do a more contextual analysis of the Dutch, German, US, Scots and English legal position pertaining to the unilateral relocation of a specified servitude of right of way.[2]

3.2 Dutch law

In *Linvestment* the court stated that the *Gardens Estate* decision was mistaken as to the state of South African law relating to servitudes when the judgment was written and that the court should have applied the Roman Dutch principles set out in the draft civil code of Professor JM Kemper in 1816. The Roman Dutch principles set out in article 1317 of the

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[1] [2008] 2 All SA 493 (SCA).

[2] The court in *Linvestment* provided comparative reasons to justify its departure from the common law position. Instead of using primary sources, the court merely used secondary sources without any discussion regarding their comparative value or context. The court referred to the *Ontwerp* of Professor Meijers, who stated that the unilateral relocation of a specified servitude of right of way is recognised by many foreign codes, including Switzerland, Italy and Greece, provided that the servient owner proves that the dominant owner's servitutal rights will not be reduced. Meijers EM *Ontwerp voor een Nieuw Burgerlijk Wetboek 2 Toelichting* (Book 5) (1955) at 428. See footnote 32 in *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 27. Furthermore, the court referred briefly to the Belgian Civil Code and the German Civil Code, as well as the discussion of the Scots law by Cuisine and Paisley. See *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 28-29. This research did not focus on the Italian, Swiss and Greek law due to the language barrier. The jurisdictions that are investigated in this thesis provide sufficient results to enable the conclusion.

draft civil code of Professor JM Kemper in 1816 regarding the unilateral relocation of servitudes state that the owner of the servient estate may not act in a manner that will lessen the utility of the servitude.[3] Furthermore, it provides that the owner of the servient estate may only relocate the servitude if the original location of the servitude becomes burdensome for him or if the original location of the servitude prohibits him from making necessary reparation to the servient estate.[4] Article 1188 of the 1820 draft civil code retained the same wording as the 1816 draft civil code of Professor JM Kemper. The draft civil code of Professor JM Kemper was never official law in the Netherlands and did not influence the Dutch Civil Code.[5]

The Dutch law of servitudes is regulated by the Dutch Civil Code.[6] Article 739 of the old Dutch Civil Code provides that the owner of the servient estate may not act in a way that will lessen the utility of the easement. Additionally, it provides that the owner of the servient estate may not make any changes to the easement. Article 739 also states that the owner of the servient estate may not relocate the easement and that, if he should

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[3] Kemper JM, Bijleveld C & Reuvens JE *Ontwerp van het Burgerlijk Wetboek voor het Koninkrijk der Nederlanden* (1816).

[4] Kemper JM, Bijleveld C & Reuvens JE *Ontwerp van het Burgerlijk Wetboek voor het Koninkrijk der Nederlanden* (1816).

[5] Kemper JM, Bijleveld C & Reuvens JE *Ontwerp van het Burgerlijk Wetboek voor het Koninkrijk der Nederlanden* (1816). Professor JM Kemper's "*Ontwerp* of 1820 (a revised version of an earlier draft of 1816) constituted a distillation of pure Roman-Dutch law in its final stage of development." During the next nine years, Parliament worked on a new code. The Dutch *Burgerlijk Wetboek* of 1838 was substantially modelled on the *Code Civil* even though it was by no means a copy of it. The new code was accepted in Parliament and would have obtained force of law on 1 February 1831. However, by that time Belgium was in revolt and the introduction of the code was postponed. Parliament decided to rework the 1830 draft and did not return to the 1816 and 1820 drafts by Professor JM Kemper. Accordingly, the Dutch Civil Code of 1838 remained very close to the 1804 Napoleonic code (*Code Civil*). See Lesaffer R "A short legal history of the Netherlands" in Taekema HS (ed) *Understanding Dutch Law* (2004) 31-58 at 57. It appears as if the provisions pertaining to the unilateral relocation of servitudes in the *Code Civil* were adopted in the old Dutch Civil Code (1838). Article 701 of the *Code Civil* states that a servient owner may do nothing to diminish the use of it or to make it less convenient. Therefore, the servient owner may not relocate the servitude to a place different from that where it was assigned initially. However, if the initial location of the servitude becomes more onerous to the servient owner or if it prevents him from making advantageous repairs, the servient owner may relocate the servitude, provided that the new route is convenient for the dominant owner. The dominant owner may not refuse the relocation of the servitude. See Crabb JH *The French Civil Code Revised Edition* (as amended to 1 July 1994) (1995) 148. See Chapter 2 section 2.6.

[6] Also known as *Het Burgerlijk Wetboek*. The Dutch *Burgerlijk Wetboek* of 1838 entered into force on 1 October 1838. See Fontein A "A century of codification in Holland" (1939) 21 *J Comp L* 83-88; Meijer G & Meijer SYTH "Influence of the Code Civil in the Netherlands" (2002) 14 *Eur Jnl Law & Econ* 227-236 at 230-231; Lesaffer R "A short legal history of the Netherlands" in Taekema HS (ed) *Understanding Dutch Law* (2004) 31-58 at 57.

relocate the servitude, he should do so without prejudicing the owner of the dominant estate.

Questions which arose when interpreting this provision was whether the owner of the servient estate may relocate the servitude unilaterally, without obtaining the necessary consent from the owner of the dominant estate, or whether it is a prerequisite that he had to obtain the necessary consent from the owner of the dominant estate, or whether he should seek a declaratory order from the court in the case where the owner of the servient estate refuses to provide the necessary consent.[7] The influential commentary of Asser stated that if the owner of the servient estate made any changes to the location of the servitude and if such relocation is not in conflict with the rights of the owner of the dominant estate, the holder of the servitude should accept such relocation, unless he is prejudiced by it.[8] The burden of proof will rest on the owner of the dominant estate to prove that such relocation will interfere with his servitutal rights.[9] If the owner of the dominant estate refuses to provide the necessary consent, then the owner of the servient estate should seek a declaratory order from the court.[10] The servient owner will have to prove that the dominant owner will not be prejudiced by such relocation.[11]

Article 5:73 paragraph 2 of the new Dutch Civil Code now states that the contents of the easement and the manner in which the contracting parties should exercise their rights are determined by the instrument of establishment and, to the extent that the instrument of establishment is silent, by local usage.[12] Furthermore, it is also said that in order to exercise the easement, the owner of the servient property may allocate a part of the property other than that on which the easement would be exercised in accordance with article 5:73 paragraph 1, provided that such relocation is possible without reducing the

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[7] Asser C, Limburg J, Meijers EM, Ploeg PW, Scholten P & Scholten P *Handleiding tot de Beoefening van het Nederlandsch Burgerlijk Recht* (*Tweede deel – Zakenrecht* 6th imp 1927) 245-247.
[8] Asser C, Limburg J, Meijers EM, Ploeg PW, Scholten P & Scholten P *Handleiding tot de Beoefening van het Nederlandsch Burgerlijk Recht* (*Tweede deel – Zakenrecht* 6th imp 1927) 245-247.
[9] HR 22 Maart 1872 *W* 3444.
[10] Asser C, Limburg J, Meijers EM, Ploeg PW, Scholten P & Scholten P *Handleiding tot de Beoefening van het Nederlandsch Burgerlijk Recht* (*Tweede deel – Zakenrecht* 6th imp 1927) 245-247.
[11] Asser C, Limburg J, Meijers EM, Ploeg PW, Scholten P & Scholten P *Handleiding tot de Beoefening van het Nederlandsch Burgerlijk Recht* (*Tweede deel – Zakenrecht* 6th imp 1927) 245-247.
[12] BW 5:73 par 2. See Warendorf H, Thomas R & Curry-Sumner I "Book 5 Title 6 Easements" in *The Civil Code of the Netherlands* (2009) 599-640 at 615.

right of the owner of the dominant estate.[13] The owner of the servient estate will be held liable for any expenses resulting from the relocation of the servitude.[14] The Dutch Supreme Court has stated that the owner of the dominant estate may be compelled by the court to cooperate with the owner of the servient estate.[15] Even though it is not a prerequisite that judicial consent should be provided, the owner of the servient estate may only relocate the servitude unilaterally, without having to obtain the consent from the owner of the dominant estate, if such relocation is reasonable and if such relocation will not lessen the utility of the easement for the holder of the servitude.[16] If there is any doubt pertaining to the reasonableness of the relocation, the owner of the servient estate should obtain a declaratory order from the court and this would provide him with the necessary consent to relocate the servitude.[17]

The court may modify or terminate an easement upon the claim of the owner of the servient estate-[18] The court may only modify the easement in accordance with standards of reasonableness and fairness, if there are unforeseen circumstances which are of such a nature that the owner of the servient estate cannot be required to maintain the easement unchanged.[19] The court may also modify or terminate an easement if twenty years have passed since the easement was created, and if the existence of the easement is contrary to the public interest.[20]

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[13] BW 5:73 par 2. See Warendorf H, Thomas R & Curry-Sumner I "Book 5 Title 6 Easements" in *The Civil Code of the Netherlands* (2009) 599-640 at 615.
[14] BW 5:73 par 2. See Warendorf H, Thomas R & Curry-Sumner I "Book 5 Title 6 Easements" in *The Civil Code of the Netherlands* (2009) 599-640 at 615.
[15] HR 21 January 1972; NJ 1973, 480, NJ 1987, 844. See further Mijnssen FHJ, Bartels SE & Van Velten AA *Mr C Assers Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht* vol 5 *Zakenrecht Eigendom en Beperkte Rechten* (15th ed 2008) 186.
[16] Rb 's Gravenhage 25 November 1999, KG 2000, 2.
[17] See Mijnssen FHJ, Bartels SE & Van Velten AA *Mr C Assers Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht* vol 5 *Zakenrecht Eigendom en Beperkte Rechten* (15th ed 2008) 186.
[18] BW 5:78. See Warendorf H, Thomas R & Curry-Sumner I "Book 5 Title 6 Easements" in *The Civil Code of the Netherlands* (2009) 599-640 at 617. See Mijnssen FHJ, Bartels SE & Van Velten AA *Mr C Assers Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht* vol 5 *Zakenrecht Eigendom en Beperkte Rechten* (15th ed 2008) 185.
[19] BW 5:78. See Warendorf H, Thomas R & Curry-Sumner I "Book 5 Title 6 Easements" in *The Civil Code of the Netherlands* (2009) 599-640 at 617. See Mijnssen FHJ, Bartels SE & Van Velten AA *Mr C Assers Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht* vol 5 *Zakenrecht Eigendom en Beperkte Rechten* (15th ed 2008) 185.
[20] BW 5:78. See Warendorf H, Thomas R & Curry-Sumner I "Book 5 Title 6 Easements" in *The Civil Code of the Netherlands* (2009) 599-640 at 617.

Article 5:80 provides that if it has become permanently or temporarily impossible to exercise the easement or where the interest of the owner of the dominant property has been diminished, the court may alter the contents of an easement upon the demand of the owner of the dominant estate, to such an extent that the possibility of the exercise of the servitutal rights is restored.[21] This provision is subject to the requirement that the change can be imposed upon the owner of the servient estate in accordance with standards of reasonableness and fairness.[22]

Additionally, article 5:81 paragraph 1 of the Dutch Civil Code now provides that the court may allow a claim in accordance with article 5:78 of the Dutch Civil Code, subject to the conditions to be determined by the court.[23] Article 5:81 paragraph 2 provides that if one of the properties is encumbered with a limited right, the claim will only be allowed if the holder of the limited right has been joined in the action. The interests of the holder of the limited right must be taken into consideration in determining whether the requirements of article 5:78 have been complied with.[24]

3.3 German law

Paragraph 1023(1) of the German Civil Code states that if the use of a (specified) servitude is restricted to a part of the servient piece of land, the owner may demand the removal of the use to another location, which is equally suitable for the holder of the right.[25] The owner of the servient estate may only relocate the servitude if the use on the

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[21] BW 5:80. See Warendorf H, Thomas R & Curry-Sumner I "Book 5 Title 6 Easements" in *The Civil Code of the Netherlands* (2009) 599-640 at 617; Mijnssen FHJ, Bartels SE & Van Velten AA *Mr C Assers Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht* vol 5 *Zakenrecht Eigendom en Beperkte Rechten* (15th ed 2008) 201.

[22] BW 5:80. See Warendorf H, Thomas R & Curry-Sumner I "Book 5 Title 6 Easements" in *The Civil Code of the Netherlands* (2009) 599-640 at 617; Mijnssen FHJ, Bartels SE & Van Velten AA *Mr C Assers Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht* vol 5 *Zakenrecht Eigendom en Beperkte Rechten* (15th ed 2008) 201.

[23] BW 5:81 par 1. See Warendorf H, Thomas R & Curry-Sumner I "Book 5 Title 6 Easements" in *The Civil Code of the Netherlands* (2009) 599-640 at 617; Mijnssen FHJ, Bartels SE & Van Velten AA *Mr C Assers Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht* vol 5 *Zakenrecht Eigendom en Beperkte Rechten* 198, 200-201.

[24] BW 5:81 par 2. See Warendorf H, Thomas R & Curry-Sumner I "Book 5 Title 6 Easements" in *The Civil Code of the Netherlands* (2009) 599-640 at 617.

[25] Forrester IS, Goren SL & Ilgen HM *The German Civil Code* Book 1-5 (as amended to January 1, 1975) Book 3: § 1023 at 169.

present location is onerous for him.[26] A servitude will be regarded as "onerous" when it creates more than a mere inconvenience for the servient owner.[27] A temporary impairment is an insufficient ground to relocate a servitude.[28] The impairment of the current position for the servient owner should not be weighed against the impact on the holder of the servitude because there should not be any impact; relocation of a specified servitude of right of way is only allowed to an equally suitable position.[29] An alternative position that is equally suitable for the holder of the servitude must exist.[30] The alternative position must be on the same property, even if it is a part of the property that was acquired after the servitude was created.[31] The servitude holder may choose a suitable alternative position when there is more than one suitable location available.[32] The owner of the servient estate will have to bear the costs of removal and will have to pay in advance.[33]

Paragraph 1023(1) applies in situations where the part of the piece of land to which the use is limited is determined by legal transaction. The right to the removal cannot be excluded or limited by legal transaction.[34] Paragraph 1023 is not applicable if the servitude was constituted generally.[35] The servient owner is entitled to use self-help and he has the

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[26] Forrester IS, Goren SL & Ilgen HM *The German Civil Code* Book 1-5 (as amended to January 1, 1975) Book 3: § 1023 at 169.
[27] Otto DU "Diensbarkeiten Titel 1: Grunddienstbarkeiten" in Dauner-Lieb B, Heidel T & Ring G (eds) *Nomos Kommentar BGB* vol 3 Ring G, Grziwotz & Keukenschrijver A (eds) *Sachenrecht* (2nd ed 2008) 831-911 at 888.
[28] Otto DU "Diensbarkeiten Titel 1: Grunddienstbarkeiten" in Dauner-Lieb B, Heidel T & Ring G (eds) *Nomos Kommentar BGB* vol 3 Ring G, Grziwotz & Keukenschrijver A (eds) *Sachenrecht* (2nd ed 2008) 831-911 at 889.
[29] Otto DU "Diensbarkeiten Titel 1: Grunddienstbarkeiten" in Dauner-Lieb B, Heidel T & Ring G (eds) *Nomos Kommentar BGB* vol 3 Ring G, Grziwotz & Keukenschrijver A (eds) *Sachenrecht* (2nd ed 2008) 831-911 at 888.
[30] Otto DU "Diensbarkeiten Titel 1: Grunddienstbarkeiten" in Dauner-Lieb B, Heidel T & Ring G (eds) *Nomos Kommentar BGB* vol 3 Ring G, Grziwotz & Keukenschrijver A (eds) *Sachenrecht* (2nd ed 2008) 831-911 at 889.
[31] Otto DU "Diensbarkeiten Titel 1: Grunddienstbarkeiten" in Dauner-Lieb B, Heidel T & Ring G (eds) *Nomos Kommentar BGB* vol 3 Ring G, Grziwotz & Keukenschrijver A (eds) *Sachenrecht* (2nd ed 2008) 831-911 at 889.
[32] Otto DU "Diensbarkeiten Titel 1: Grunddienstbarkeiten" in Dauner-Lieb B, Heidel T & Ring G (eds) *Nomos Kommentar BGB* vol 3 Ring G, Grziwotz & Keukenschrijver A (eds) *Sachenrecht* (2nd ed 2008) 831-911 at 889.
[33] Forrester IS, Goren SL & Ilgen HM *The German Civil Code* Book 1-5 (as amended to January 1, 1975) Book 3: § 1023 at 169.
[34] Forrester IS, Goren SL & Ilgen HM *The German Civil Code* Book 1-5 (as amended to January 1, 1975) Book 3: § 1023 at 169.
[35] Otto DU "Diensbarkeiten Titel 1: Grunddienstbarkeiten" in Dauner-Lieb B, Heidel T & Ring G (eds) *Nomos Kommentar BGB* vol 3 Ring G, Grziwotz & Keukenschrijver A (eds) *Sachenrecht* (2nd ed 2008) 831-911 at 888.

right to demand the relocation of the servitude but if an agreement cannot be reached he must seek a declaratory order from court.[36] If the owner of the dominant tenement and the owner of the servient tenement cannot reach an agreement, the servient owner has to approach the court.

3.4 US law

This section of the chapter will focus on the US law governing servitudes. Issues often arise regarding the interpretation of the scope of easements. The exact content of the rights entrenched by the easement is often at issue, especially when the use rights interfere with the interests sought to be retained by the owner of the servient estate.[37] One of the issues that arise in the interpretation of the scope of easements is whether the easement can be relocated by either the easement owner or the owner of the servient estate.[38] Traditionally, courts in the US have not allowed the owner of the servient estate to relocate the easement unilaterally without obtaining the necessary consent from the easement owner, on the ground that the easement holder bargained for a fixed location and that any changes that might reduce the utility and value of the easement cannot be authorised without the agreement of the easement owner.[39] Until the late 1990s, the nearly uniform majority rule in the American common law was that the owner of the servient estate could not relocate an easement once it had been specified.[40] In *Davis v Bruk*[41] the court stated that in the majority of jurisdictions the rule is that once the location of an easement is established, the location may not be changed thereafter by either the owner of the dominant estate or the owner of the servient estate, unless consent has been obtained from both parties to relocate the route. However, where the document creating the easement contains an express or implied grant of reservation of power to relocate,

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[36] Otto DU "Diensbarkeiten Titel 1: Grunddienstbarkeiten" in Dauner-Lieb B, Heidel T & Ring G (eds) *Nomos Kommentar BGB* vol 3 Ring G, Grziwotz & Keukenschrijver A (eds) *Sachenrecht* (2nd ed 2008) 831-911 at 889.
[37] Singer JW *Introduction to Property* (2nd ed 2005) 217.
[38] Singer JW *Introduction to Property* (2nd ed 2005) 217.
[39] See Singer JW *Introduction to Property* (2nd ed 2005) 222. The term "easement owner" refers to the owner of the servient tenement and the term "easement holder" refers to the owner of the dominant tenement.
[40] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 359.
[41] *Davis v Bruk* 411 A 2d 660 (Me 1980) 664-666. In this case the court stated that judicial relocation of established easements could create uncertainty in real estate transactions.

then the servitude may be relocated without having to obtain the necessary consent.[42] In all other instances, the owner of the servient estate could only relocate the easement with the permission of the easement owner. Some courts still retain this view.[43]

It is important to note Louisiana's uniqueness because it was one of the first states in the US to provide a flexible approach pertaining to the relocation of a specified servitude of right of way.[44] The Louisiana Civil Code does not contain any equivalent to the US common law's changed conditions doctrine.[45] The US common law's changed conditions doctrine holds that servitudes are unenforceable when circumstances have changed since the creation of the obligation so that it is no longer possible to secure the originally intended benefits.[46] In Louisiana[47] and in France,[48] praedial servitudes are only terminated in narrowly defined circumstances.[49] In Louisiana, article 748 of the Louisiana Civil Code, which permits the unilateral relocation of a specified servitude or right of way, and article 695, which provides for the relocation of a specified servitude of right of way of an enclosed estate, are "the sole judicial, safety valves for the accommodation of a servitude

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[42] *Davis v Bruk* 411 A 2d 660 (Me 1980) 664-666.

[43] *Herren v Pettengill* 273 Ga 122, 538 S E 2d 735 (2000) 123; *Sloan v Rhodes* 560 S E2d 653 (Ga 2002) 879-880; *MacMeekin v Low Income Housing Institute Inc* 111 Wash App 188, 45 P 3d 570 (Div 1 2002); In *Koeppen v Bolich* 318 Mont 240, 79 P 3d 1100 (2003) the court held that dominant easement owners cannot be permitted to roam all over the servient tenement, nor can they select a new route of travel without obtaining the necessary consent of the servient owner, whenever the route set aside for that purpose becomes founderous, impassible or inconvenient.

[44] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 42.

[45] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 42.

[46] Restatement of Property: Servitudes §564 (1944). See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 42.

[47] The relevant articles illustrating how servitudes are extinguished in the Louisiana law are as follows: Article 751 of the Louisiana Civil Code (1980) provides that a servitude will be extinguished in situations where the dominant estate or the part of the servient tenement burdened with the land are destructed, Article 753 provides that a servitude will be extinguished by prescription of non-use, Articles 765 and 770 states that a servitude will be extinguished when the servient and dominant estates are merged into the same person and article 771 states that a servitude will be extinguished by express and written renunciation by the owner of the dominant estate. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 43.

[48] The relevant articles illustrating how servitudes are extinguished in the French law are as follows: article 703 states that servitudes cease when the things are in such a state that they can no longer be used, article 705 states that a servitude is extinguished when the land to which it is due and the land which owes it are united in the same land and article 706 provides that a servitude is extinguished by non-use of thirty years. See Crabb JH *The French Civil Code Revised Edition* (as amended to 1 July 1994) (1995) 148.

[49] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 42-43.

holder's right with a servient owner's desire to adapt to changing economic and social conditions".[50]

Louisiana's law of servitudes is derived largely from the French Civil Code, also known as the *Code Napoléon*, whose servitude provisions are indebted to Roman law.[51] Louisiana's experience with the relocation of servitudes began with the adoption of the Louisiana Digest of 1808.[52] When the drafters of the Digest created article 46 of Book II, Title IV of the 1808 Digest, they copied article 701 of the 1804 *Code Napoléon*.[53] Louisiana accepted the default principle of the *Code Napoléon*, namely that a conventional servitude would be defined by two contradictory traits.[54] Article 701 of the *Code Napoléon* states, on the one hand, that the owner of the servient estate is not entitled to diminish the utility and convenience of the servitude to the owner of the dominant estate by changing the nature of the servient estate without justifiable reasons.[55] On the other hand, article 701 states that a servitude is also subject to discretionary judicial modification. The owner of the servient estate can only relocate the servitude if the initial servitude had become burdensome to the owner of the servient estate and if the initial servitude prevented the owner of the servient estate from making some advantageous repairs.[56] The servient owner can only do the above if he can provide an alternative location which is equally convenient for the owner of the dominant estate.[57] According to Batiza,[58] the Louisiana Digest was directly copied from the French Civil Code of 1804 and the Project of 1800. The legislature in Louisiana expanded and revised the Digest of 1808 and created the Louisiana Civil Code of 1825.[59] When creating the Louisiana Civil Code of 1825, the

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[50] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 43.
[51] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 355.
[52] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 377. See Louisiana Civil Code (1808).
[53] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 377.
[54] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 379.
[55] Article 701 *Code Napoléon* 1804. See Crabb JH *The French Civil Code Revised Edition* (as amended to 1 July 1994) (1995) 148.
[56] Article 701 *Code Napoléon* 1804. See Crabb JH *The French Civil Code Revised Edition* (as amended to 1 July 1994) (1995) 148.
[57] Article 701 *Code Napoléon* 1804. See Crabb JH *The French Civil Code Revised Edition* (as amended to 1 July 1994) (1995) 148.
[58] Batiza R "The Louisiana Civil Code of 1808: Its actual sources and present relevance" (1971) 46 *Tul LR* 4-135 at 11-12; Batiza R "Origins of modern codification of the Civil Law: The French experience and its implications for Louisiana" (1982) 56 *Tul LR* 477-600 at 488-518, 524-525, 539-540.
[59] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 378.

legislature copied article 64 and renumbered the Louisiana Civil Code dealing with the relocation of servitudes to article 773.[60] When the legislature adopted the Louisiana Civil Code of 1870, the legislature copied the early codified versions derived from the *Code Napoléon* and renumbered the provision regarding the relocation of servitudes to article 777.[61]

In 1825, the legislature also adopted one more servitude relocation article, namely article 699 (later article 703 of the Louisiana Civil Code).[62] This specific article concentrates on the right of passage and of way in cases where the specific parcel of land does not have any access to public routes.[63] This article provides that if the owner of the dominant tenement and the owner of the servient tenement have agreed on a route serving the landlocked property, it may not be changed by the enclosed estate owner, but may be relocated by the owner of the servient estate if the original route has become a burden to him, provided that he can provide an alternative route which is equally convenient.[64] The main difference between article 777 and 703 of the Louisiana Civil Code of 1870 is that article 703 did not require that the owner of the servient estate should prove that the original location has become more burdensome.[65] The principles relating to the relocation of servitudes have emerged more or less unchanged in the current version of the Louisiana Civil Code, which has undergone extensive revision since the beginning of 1977.[66] Article 703 of the Louisiana Civil Code of 1870 has been revised and has been renumbered to article 695 in the Louisiana Civil Code of 1980.[67] Article 695 provides the owner of a servient estate with the same relocation rights provided for in article 703 of the

[60] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 378.
[61] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 379.
[62] Article 699 of the Louisiana Civil Code (1825) (Article 699 has been revised and is currently known as article 703 of the Louisiana Civil Code (1870)). This specific article deals with the "Right of Passage and of Way" and is patterned on articles 682-685 of the *Code Napoléon* 1804. Article 699 had no model in the *Code Napoléon* 1804. See Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 379.
[63] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 380.
[64] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 379.
[65] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 379.
[66] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 380.
[67] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 380.

1870 Civil Code.[68] The only change is that the owner of the servient estate, who wishes to relocate the easement, should pay for the relocation himself.[69]

Revised article 748 of the current Louisiana Civil Code provides essentially the same rights that existed under article 777 of the 1870 Louisiana Civil Code.[70] A key difference that exists between the new article 748 and its 19th century predecessor is that the second paragraph of article 777[71] was suppressed by article 748.[72] Article 777's second paragraph prohibited the servient owner from making any alteration in the condition of the servient estate or moving the servitude to a different place.[73] This second paragraph was inconsistent with the third paragraph of article 777.[74] The third paragraph of article 777 authorised the relocation of a servitude to an equally convenient place when the initial assignment of the servitude had become burdensome or in circumstances where advantageous repairs were needed.[75] Apart from an updating of language, the only other change is the addition of an express requirement, namely that the servient owner bear the expenses of relocation.[76] This requirement was implicit in article 777 of the 1870 Louisiana Civil Code and is implicit in Scots law as well.[77] Article 748[78] provides that the servient owner may do nothing to diminish the use of the servitude. If the initial location of the servitude has become more burdensome for the servient owner or if it should prevent him from making useful improvements, the servient owner may provide another equally convenient location.[79] The dominant owner is bound to accept the alternative route. The owner of the servient tenement should pay the necessary expenses.[80]

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[68] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 380.
[69] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 380.
[70] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 380.
[71] Louisiana Civil Code (1870).
[72] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 380.
[73] Article 777 Louisiana Civil Code (1870).
[74] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 380.
[75] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 380.
[76] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 380.
[77] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.68. See Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 380.
[78] Louisiana Civil Code (1980). See Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 380.
[79] Louisiana Civil Code (1980). See Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 380.
[80] Article 748 Louisiana Civil Code (1980). See Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 380.

According to Lovett,[81] the first noteworthy aspect of Louisiana's judicial experience with regard to the relocation of servitudes is that there are no reported 19th century decisions. Lovett[82] states that the absence of 19th century decisions pertaining to the relocation of servitudes illustrates that neighbours have strong incentives to reach extrajudicial compromises. In order to illustrate his point, he states that a servient owner may not seek to relocate a servitude without consent, unless the original location of the servitude poses a serious development obstacle and if the owner of the servient estate can provide a route which is equally convenient.[83] Similarly, Lovett[84] states that a servitude holder might not reject a request from the owner of the servient estate to relocate a route because he may fear that a court might order relocation anyway. Furthermore, Lovett[85] adds that if the owner of the dominant estate should need the consent of the servient owner to relocate the servitude, he might agree to the relocation request of the owner of the servient estate in the hope that it would earn him a reciprocal favour in the future. The first Louisiana decision dealing with the relocation of servitudes was reported in 1928.[86]

It was not until the 1970s and 1980s, during Louisiana's Civilian Renaissance, that the courts in Louisiana brought clarity to the interpretation of the Civil Code's servitude relocation articles.[87] The process of clarification began in 1970, when the Louisiana Supreme Court realised the significance of article 777[88] in *Denegre v Louisiana Public Service Commission*[89] (*Denegre*). This case was an appeal against the judgment of the 19th Judicial District Court, which affirmed the action of the Public Service Commission denying the petitioner's application for removal and relocation of certain switch tracks that were situated on land recorded in the petitioner's name (Denegre). *Denegre v Louisiana Public Service Commission*[90] concerned a request by the owner of the servient estate (Denegre) to relocate several conventional servitudes providing railroad rights of way, so

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[81] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 380.
[82] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 381. See Sterk SE "Neighbors in American land law" (1987) 87 *Colum LR* 55-103.
[83] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 381.
[84] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 381.
[85] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 381.
[86] *Hotard v Perriloux* 8 La App 476 (1928) WL 3837 (La App Orleans).
[87] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 383.
[88] Article 777 of the Louisiana Civil Code (1870).
[89] *Denegre v Louisiana Public Service Commission* 257 La 503, 242 So 2d 832 (1979).
[90] *Denegre v Louisiana Public Service Commission* 257 La 503, 242 So 2d 832 (1979).

that Denegre could better utilise his property for commercial development.[91] The railroad carriers had no objection to the relocation of the tracks, but the neighbours and customers of the railroads did object.[92] The railroad carriers did not object, provided that certain conditions were met by Denegre. The conditions were the following: that none of the parties served by the existing switch tracks are adversely affected by the proposed removal and relocation, that all property owners with an interest consented to such removal and relocation and that the petitioner (Denegre) will carry all the expenses.[93] The Commission, with one member dissenting, denied Denegre's request. On appeal to the District Court, this action was affirmed.[94] Denegre asserted that he had the authority to change the servitude of passage if the usage of the current servitude of passage is inconvenient and burdensome and proved that he can provide a place which is convenient as the original route. For this view, Denegre relied on articles 703, 753 and 777 of the Louisiana Civil Code.[95] However, the majority held that the articles of the Louisiana Civil Code cited by the petitioner were without application.[96] Article 703 states that the place of the servitude may be changed by the owner of the servient estate to an alternative place which is less inconvenient to him, provided that the owner of the servient estate can provide a route which is equally convenient. The majority held that article 703 was irrelevant because it dealt with praedial servitudes and that the application of article 703 therefore pertains only to servitudes imposed by law.[97] Furthermore, the majority held that the other two articles cited by the petitioner applied to conventional servitudes which, like the ones involved here, are without application as conventional servitudes and, according to article 709, are regulated by the titles under which they were granted.[98] It is only where there are no written titles that the articles following article 709 have any pertinence, or unless the conventional titles contain provisions contrary to public policy.[99]

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[91] *Denegre v Louisiana Public Service Commission* 257 La 503, 242 So 2d 832 (1979) 509.
[92] *Denegre v Louisiana Public Service Commission* 257 La 503, 242 So 2d 832 (1979) 509.
[93] *Denegre v Louisiana Public Service Commission* 257 La 503, 242 So 2d 832 (1979) 509.
[94] *Denegre v Louisiana Public Service Commission* 257 La 503, 242 So 2d 832 (1979) 509.
[95] *Denegre v Louisiana Public Service Commission* 257 La 503, 242 So 2d 832 (1979) 512.
[96] *Denegre v Louisiana Public Service Commission* 257 La 503, 242 So 2d 832 (1979) 512.
[97] *Denegre v Louisiana Public Service Commission* 257 La 503, 242 So 2d 832 (1979) 512.
[98] *Denegre v Louisiana Public Service Commission* 257 La 503, 242 So 2d 832 (1979) 512.

[99] *Denegre v Louisiana Public Service Commission* 257 La 503, 242 So 2d 832 (1979) 512.

Justice Tate, who is an important figure in Louisiana's Civilian Renaissance, asserted that if an owner of the servient estate seeks to relocate a railroad right of way, he should be able to secure a judicial adjudication under article 777 of the Louisiana Civil Code for relocation to a place which is less burdensome.[100] Justice Tate declared that in order for the owner of the servient estate to succeed with the relocation, the appropriate public regulatory agency should determine that the public's transportation interests would not be prejudiced.[101] According to Lovett,[102] Justice Tate correctly found that the real issue of the case is not the public and administrative law issues on which the majority had focused, but the battle over private interests.[103] Justice Tate corrected the erroneous dicta in the majority decision that restricted the application of articles 753 and 777 of the Louisiana Civil Code to servitudes established without valid written titles; servitudes established by implication, judgment or prescription; or servitudes that contain titles against public policy.[104] Justice Tate held that the intent of these articles is to permit the court to relocate the servitude when the exercise of the servitude is located in a place too burdensome upon the encumbered estate and that the court should weigh the competing interests when exercising its judicial discretion.[105] According to Lovett,[106] Justice Tate's concurrence in *Denegre* re-established the superiority of the Louisiana Civil Code's servitude relocation principles and also highlighted the fact that even though servitudes create property rights, they will always be subsidiary to society's need for flexibility in instances where the original location of the servitude becomes too burdensome for the owner of the servient estate.[107]

In other reported cases, the Louisiana Supreme Court demonstrated that attempts made by the owner of a servient estate to relocate servitudes non-consensually would be subject to scrutiny;[108] that judicial authorisation for relocation in advance of unilateral action is not

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[100] *Denegre v Louisiana Public Service Commission* 257 La 503, 242 So 2d 832 (1979) 518.
[101] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 383. See Lovett JA "Another great debate? The ambiguous relationship between the revised Civil Code and pre-revision jurisprudence as seen through the Prytania Park controversy" (2002) 48 *Loy LR* 615-714 at 632-635 (discusses Justice Tate's views on civil code interpretation).
[102] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 384.
[103] *Denegre v Louisiana Public Service Commission* 257 La 503, 242 So 2d 832 (1979) 518.
[104] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 384.
[105] *Denegre v Louisiana Public Service Commission* 257 La 503, 242 So 2d 832 (1979) 521.
[106] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 385.
[107] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 385.
[108] *Discon v Saray Inc* 265 So 2d 765 (La 1972).

necessarily required, but advisable nonetheless;[109] and that when the owner of the servient estate's proposed relocation complies with the requirements of the Louisiana Civil Code, he may reap the enhanced development value himself without having to share it with the servitude holder.[110]

In the mid-1990s something unexpected happened.[111] The Louisiana rule regarding the role of servitude relocation, which authorises the owner of a servient estate to relocate a specified servitude at his own expense as soon as the original location becomes burdensome on the servient estate and as long as he provides an alternative route which is equally convenient,[112] was adopted by the American Law Institute's Restatement (Third) of Property (Servitudes) § 4.8 (2000) as the proposed new default rule for the relocation of servitudes in US law generally.[113] During the last couple of years the leading courts in four common law states (Colorado, South Dakota, New York, and Massachusetts) adopted the Restatement's rule which was originally borrowed from the Louisiana Civil Code.[114] Even though certain courts in the US retained the traditional common law position, some courts in the US began to adopt the Restatement rule by allowing the owner of the servient estate to relocate the easement irrespective of whether consent was obtained from the owner of the dominant estate or not.[115]

This part of the chapter will discuss the content of The Third Restatement of Property (Servitudes).[116] The Restatement declares that, except where the location and dimensions of an easement are determined by the instrument creating a servitude, it should be determined as follows: In the first instance, the owner of the servient estate has the

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[109] *Brian v Bowlus* 399 So 2d 545 (La 1981).
[110] *Ogden v Bankston* 398 So 2d 1037 (La 1981).
[111] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 359.
[112] Article 748 Louisiana Civil Code.
[113] See Restatement (Third) of Property: Servitudes § 4.8(3) (2000). Comment (f) notes that s 4.8(3) "adopts the civil law rule that is in effect in Louisiana and a few other states". This rule was proposed for the first time in a tentative draft of chapter 4 of the Restatement in 1994. See also Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 359.
[114] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 358; citing *Stanga v Husman* 694 NW 2d 716 (SD 2005) 718-720; *LLC v Dwyer* 809 NE 2d 1053 (Mass 2004) 1057; *Lewis v Young* 705 NE 2d 649 (NY 1998) 653-654; *Roaring Fork Club LP v St Judes Co* 36 P 3d 1229 (Colo 2001) 1237.
[115] *Lewis v Young* 705 N E 2d 649 (NY 1998); *Roaring Forks Club v St Jude's Co* 36 P 3d 1229 (Colo 2001).
[116] American Law Institute *Restatement of the Law – Property Restatement (Third) of Property: Servitudes* § 4.8(3) (2000) *Location, Relocation, and Dimensions of a Servitude*.

authority to locate a servitude.[117] The specified location must be reasonably suited in order for the owner of the dominant estate to carry out the purpose for which the servitude was created.[118] The reason why the servient owner is given the authority to select the location of a servitude in the first instance is because the owner of the servient estate is better able to specify a route that will not interfere with the value and future development of the servient estate.[119] The requirement that the location should be reasonably suitable to the purpose that the servitude was created for also grants the holder of the easement a means of protection.[120] The Restatement[121] also provides that the holder of the servitude may proceed to locate the route if the owner of the servient estate should fail to allocate a suitable location within a reasonable time. A location is regarded as suitable if it gives effect to the purpose that the servitude was created for, while at the same time inflicting the minimum amount of damage on the servient estate.[122] Furthermore, the Restatement[123] articulates that the dimensions of a servitude should be of such a nature that it is reasonably necessary for enjoyment of the servitude. It states that if the parties intend that the servitude should be capable of adapting to changing uses under the principles stated in § 4.10, they may intend that the dimensions should change over time to provide the space necessary for enjoyment of the servitude.[124] However, if the dimensions of the servitude are specified and if they are interpreted as establishing the maximum size, then in such a case the dimensions of the servitude cannot be enlarged unilaterally by the owner of the servient estate.[125] The Restatement[126] also mentions that

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[117] American Law Institute *Restatement of the Law – Property Restatement (Third) of Property: Servitudes* § 4.8(1) (2000) *Location, Relocation, and Dimensions of a Servitude*.
[118] American Law Institute *Restatement of the Law – Property Restatement (Third) of Property: Servitudes* § 4.8(1) (2000) *Location, Relocation, and Dimensions of a Servitude* (See Comment b to § 4.8(1)).
[119] American Law Institute *Restatement of the Law – Property Restatement (Third) of Property: Servitudes* § 4.8(1) (2000) *Location, Relocation, and Dimensions of a Servitude* (See Comment b to § 4.8(1)).
[120] American Law Institute *Restatement of the Law – Property Restatement (Third) of Property: Servitudes* § 4.8(1) (2000) *Location, Relocation, and Dimensions of a Servitude* (See Comment b to § 4.8(1)).
[121] American Law Institute *Restatement of the Law – Property Restatement (Third) of Property: Servitudes* § 4.8(1) (2000) *Location, Relocation, and Dimensions of a Servitude* (See Comment b to § 4.8(1)).
[122] American Law Institute *Restatement of the Law – Property Restatement (Third) of Property: Servitudes* § 4.8(1) (2000) *Location, Relocation, and Dimensions of a Servitude* (See Comment b to § 4.8(1)).
[123] American Law Institute *Restatement of the Law – Property Restatement (Third) of Property: Servitudes* § 4.8(2) (2000) *Location, Relocation, and Dimensions of a Servitude*.
[124] American Law Institute *Restatement of the Law – Property Restatement (Third) of Property: Servitudes* § 4.8(3) (2000) *Location, Relocation, and Dimensions of a Servitude* (See Comment d to § 4.8).
[125] American Law Institute *Restatement of the Law – Property Restatement (Third) of Property: Servitudes* § 4.8(2) (2000) *Location, Relocation, and Dimensions of a Servitude* (See Comment d to § 4.8(2)).

the owner of the servient estate is entitled to make reasonable changes to the servient estate as long as the changes are reasonable and do not significantly lessen the utility of the easement; do not increase the burden on the dominant owner in its use and enjoyment and do not frustrate the purpose for which the servitude was created. This rule was created to allow the owner of the servient estate to develop his property to the extent that he can accomplish this goal without interfering with the interests of the holder of the easement.[127] However, this rule is not reciprocal because it does not authorise the dominant owner to relocate the easement.[128] The American Law Institute declares that the new rule will increase overall utility as it will increase the value of the servient estate without diminishing the value of the dominant estate.[129] It also decreases the risk that the servient estate will be unduly restricted from future development.[130] Subsection 3 of the Restatement[131] adopted the civil law rule that is applied in Louisiana and a few other states.

The case of *Roaring Fork Club LP v St Jude's Co*[132] illustrates the application of the Restatement rule. In this case, Roaring Fork Club bought agricultural land on which it intended to develop a fishing and golf club. On the property, three ditches that crossed the property carried water for the landowner and for the ranch that was located next to the property. The Roaring Fork Club had to move the ditches in order for the club to build the golf course. The legal question was whether the owner of the servient estate was entitled to relocate the servitude. The Colorado Supreme Court held that the relocation of the ditches could only take place once it was proven that the relocation of the easement will not damage the easement by lessening its utility, increasing the burden on use and

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[126] American Law Institute *Restatement of the Law – Property Restatement (Third) of Property: Servitudes* § 4.8(3) (2000) *Location, Relocation, and Dimensions of a Servitude* (See Comment f to § 4.8(3)).
[127] American Law Institute *Restatement of the Law – Property Restatement (Third) of Property: Servitudes* § 4.8(3) (2000) *Location, Relocation, and Dimensions of a Servitude* (See Comment f to § 4.8(3)).
[128] American Law Institute *Restatement of the Law – Property Restatement (Third) of Property: Servitudes* § 4.8(3) (2000) *Location, Relocation, and Dimensions of a Servitude* (See Comment f to § 4.8(3)).
[129] American Law Institute *Restatement of the Law – Property Restatement (Third) of Property: Servitudes* § 4.8(3) (2000) *Location, Relocation, and Dimensions of a Servitude* (See Comment f to § 4.8(3)).
[130] American Law Institute *Restatement of the Law – Property Restatement (Third) of Property: Servitudes* § 4.8(3) (2000) *Location, Relocation, and Dimensions of a Servitude* (See Comment f to § 4.8(3)).
[131] American Law Institute *Restatement of the Law – Property Restatement (Third) of Property: Servitudes* § 4.8(3) (2000) *Location, Relocation, and Dimensions of a Servitude* (See Comment f to § 4.8(3)).
[132] *Roaring Fork Club LP v St Jude's Co* 36 P 3d 1229 (Colo 2001).

enjoyment of the easement or by frustrating the purpose that the servitude was created to serve.[133]

This rule overturned the traditional legal position advocated by the weight of authority in the United States, namely that the owner of the servient estate may not relocate an easement unilaterally. American legal scholars such as Orth[134] complain that allowing the owner of the servient estate to relocate an easement unilaterally is based on a "radical, if unacknowledged, reconceptualisation of the nature of an easement". Orth[135] reasons that the Restatement rule denies the easement owner the right to determine the utility of the easement, which is unfair. Furthermore, he states that the Restatement has the effect of devaluing the limited real right of the owner of the dominant estate and that it deprives the owner of the easement of one of the prime protections accorded private property, which is the ability to refuse to suffer the loss of property even if the other person offers property of equal value in exchange.[136] Orth[137] declares that the Restatement rule is unfair because it retains the common law prohibiting the owner of the dominant estate to relocate the servitude, while conferring on the owner of the servient estate the right to relocate a servitude unilaterally. According to Orth,[138] the Restatement rule is most likely to defeat the original intention of the parties, because if the parties to the deed wanted the easement to be relocated, they would have made an express agreement.

In *Herren v Pettengill*,[139] the court emphasised why the majority rule is sounder than the Restatement rule, namely that it provides certainty in landownership. It was held that by allowing the unilateral relocation of an easement by the owner of the servient estate,

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[133] *Roaring Fork Club LP v St Jude's Co* 36 P 3d 1229 (Colo 2001) 1239. See also French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1–15.
[134] Orth JV "Relocating easements: A response to Professor French" (2004) 38 *Real Prop Prob & Tr J* 643-654 at 653. See Chapter 5.
[135] Orth JV "Relocating easements: A response to Professor French" (2004) 38 *Real Prop Prob & Tr J* 643-654 at 653.
[136] Orth JV "Relocating easements: A response to Professor French" (2004) 38 *Real Prop Prob & Tr J* 643-654 at 653.
[137] Orth JV "Relocating easements: A response to Professor French" (2004) 38 *Real Prop Prob & Tr J* 643-654 at 653-654.
[138] Orth JV "Relocating easements: A response to Professor French" (2004) 38 *Real Prop Prob & Tr J* 643-654 at 653-654.
[139] *Herren v Pettengill* 273 Ga 122, 538 S E 2d 735 (2000) para 736. See also French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1–15 at 5.

fairness principles will be violated.[140] It would also create uncertainty in real property law by opening the door for increased litigation over reasonableness issues based on today's conditions rather than those considered in the original bargain.[141] In *MacMeekin v Low Income Housing Institute Inc*[142] the court held that the traditional approach should be applied because it favours uniformity, stability, predictability and property rights. If the traditional approach is followed, the holder of the servient estate will be obliged to purchase the right to relocate the easement if the owner of the dominant estate consents to the relocation.[143]

However, French[144] is in favour of the new rule. According to French,[145] the default rule is designed to accommodate the interests of both the owners of the servient estate and the owners of the dominant estate. She also argues that this rule allows each owner to maximize the utility of their property to a certain extent without creating any damages for the other owner.[146] The problem that French has with the traditional rule is that it has the effect of unfairly advantaging the holder of the easement at the expense of the landowner.[147] French[148] avers that the traditional rule is unfair to the owners of the servient estate because it denies the owner of the servient estate the right to make the changes to the easement which may be necessary for future development of the servient estate. In my view, Singer[149] is correct in stating that there is no easy answer to this rule choice,

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[140] *Herren v Pettengill* 273 Ga 122, 538 S E 2d 735 (2000) para 736. See also French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1–15 at 5.
[141] *Herren v Pettengill* 273 Ga 122, 538 S E 2d 735 (2000) para 736. See also French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1–15 at 5.
[142] *MacMeekin v Low Income Housing Institute Inc* 111 Wash App 188, 45 P 3d 570 (Div 1 2002) para 579. See also French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1–15 at 5.
[143] *MacMeekin v Low Income Housing Institute Inc* 111 Wash App 188, 45 P 3d 570 (Div 1 2002) para 579. See also French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1–15 at 5.
[144] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1–15.
[145] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1–15 at 11.
[146] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1–15 at 11.
[147] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1–15 at 11-12.
[148] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1–15 at 15.
[149] Singer JW *Introduction to Property* (2nd ed 2005) 223.

because it turns on different ways to measure the value of the respective interests and also because it turns on competing conceptions of the entitlements or rights in question.

3.5 Scots law

In Scots law, the term "servitude" is applied only to praedial servitudes.[150] Like the law of Louisiana, the origin of general Scots rules of servitude is Roman law.[151] According to Cuisine and Paisley,[152] it is essential in each case to determine the nature and extent of the servitutal right. It will only be possible to look at the rights and obligations of the parties in relation to servitudes once the nature and extent of the servitutal right have been determined.[153] The rights and obligations of the parties to the servitude are implied by law, but they may also be confirmed expressly or within certain limitations, or supplemented expressly by means of conventional servitude conditions in a deed.[154] It is inevitable that there must be legal principles that govern the continuing relationship between the parties entitled to the various rights.[155] When exercising a servitutal right, the owner of the dominant tenement must exercise his right in a way which is least burdensome to the servient tenement.[156]

In Scots law the question as to whether the owner of the servient estate may relocate a servitude unilaterally has also been raised. Cuisine and Paisley explain the approach followed in the Scots law by distinguishing between an early approach, a later approach and a modern composite approach.[157]

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[150] The major part of the discussion of the Scots law of servitudes will be based on Cuisine DJ & Paisley RRM *Servitudes and Right of Way* (1998) 387-489. This book discusses every conceivable aspect of the Scots law of servitudes (and some related matters). See De Waal MJ "Book review: Servitudes and rights of way – by Douglas J Cuisine and Roderick RM Paisley." (2001) 12 *Stell LR* 192-195.
[151] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 355. Due to space constraints I will not go into detail concerning the Roman legal principles of servitudes. For further reading see Buckland WW *A Text-Book of Roman Law from Augustus to Justinian* (1921).
[152] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.01.
[153] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.01.
[154] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.01.
[155] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.02.
[156] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.02.
[157] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) paras 12.37-12.80. The third approach is discussed below, following the assessment of the first two.

The early common law approach was that the owner of the servient estate was entitled to alter the route of the servitude, provided that the adjustment did not materially interfere with the legitimate exercise of the rights of the owner of the dominant estate.[158] This approach may be observed in the statements of the Institutional writers.[159] These Institutional writers indicate that the owner of the servient estate would only be entitled to divert a right of way when the owner of the servient estate wishes to enclose and labour his ground.[160] The case law decided in this period reflects the approach set out by the Institutional writers, which means that the owner of the servient estate could substitute a new route, provided that it was equally convenient and commodious as the original route.[161] According to Cuisine and Paisley,[162] the case law which applied the early common law approach did not provide a complete picture of the circumstances under which diversion of a route could be carried out. The courts did not provide any guidance as to whether the owner of the servient estate could relocate the servitude, without a court order confirming his right to do so, or whether obtaining a court order was a prerequisite.[163]

The later approach can be summarised as a much stronger preference for contract-oriented certainty, with the most important authority being the influential decision of *Hill v*

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[158] See § 987 and § 1010 in Bell GJ & Guthrie W *Principles of the Law of Scotland* (10th ed 1899) 407, 412; Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.37. However, the passages in Bankton AM *An Institute of the Laws of Scotland in Civil Rights: With Observations upon the Agreement or Diversity between them and the Laws of England. In Four Books. After the General Method of the Viscount of Stair's Institutions* II vii (1751-1753) 17 and 18 seem to conflict with the passages in Bell GJ & Guthrie W *Principles of the Law of Scotland* (10th ed 1899). According to Cuisine and Paisley, the views of Lord Bankton may be reconciled with Lord Bell's views on the basis that passage 18 indicates that when a servitude which was originally exercisable over an indefinite route has a route assigned to it, that route cannot be altered unilaterally by the servient proprietor without any justifiable cause. According to Cuisine and Paisley, passage 17 may indicate that a justifiable cause for relocating a servitude of right of way is the intention to enclose and labour ground through which it runs. See footnote 33 in Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) 405.

[159] Bell GJ & Guthrie W *Principles of the Law of Scotland* (10th ed 1899) § 987 and § 1010; Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.37.

[160] Bankton AM *An Institute of the Laws of Scotland in Civil Rights: With Observations upon the Agreement or Diversity between them and the Laws of England. In Four Books. After the General Method of the Viscount of Stair's Institutions* II vii (1751-1753) 17. See Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 1.26.

[161] *Grigor v Maclean* (1896) 24 R 86 at 89. See *Moyes v McDiarmid* (1900) 2 F 918.

[162] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.39.

[163] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.39.

Maclaren[164] (*Hill*). In the *Hill*[165] case, the owners in Dundee subdivided their land and feued[166] a part of the land to Hill. The contract granted Hill as well as his successors in title a servitude of access. The exact specification of the line and location of this servitude was selected on a plan which was attached to the original feu contract. Maclaren was the successor in title of the original proprietor, namely Dundee. Maclaren sought to relocate the original servitude. Hill, who was the owner of the dominant estate, sought a declaratory order which confirmed his right to continued access through the original way. A civil engineer appointed by the court determined that even though the route increased the length of access, it was "more commodious, safer, better lighted and therefore the more convenient of the two passages".[167] The sheriffs who heard the case ruled in favour of the owner of the servient estate. In order to justify their decision, the sheriffs relied on the decisions of the 18th century and the commentaries of the Institutional writers.[168] The approach followed by the sheriffs was rejected on appeal. Unlike the earlier cases, *Hill* involved a servitude of access where the line of the route was specified in a deed.[169] The Lord Justice Clerk Moncrieff decided that once a route is fixed by means of a contract, that route cannot be altered by the owner who has contracted to grant it.[170] Even though this principle, stated by Lord Justice Clerk Moncrieff, was not applicable to this case, as Hill was the successor in title of the original grantor (Dundee), the Lord Justice Clerk highlighted the distinction between a situation where a servitude or right of way is indefinite and situations where the line of the route is determined by contract.[171] The judge declared that in the case where a servitude is indefinite, relocation of the servitude will be possible if it is in the interests of justice.[172] If the servitude is specified, which contrasts with the principle mentioned above, the owner of the servient tenement may not demand a relocation of a servitude even though the alternative route may be as convenient as the

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[164] (1879) 6 R 1363. For a discussion of *Hill v Maclaren* (1879) 6 R 1363 see Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 369.
[165] (1879) 6 R 1363 at 1367.
[166] In Soanes C & Stevenson A (eds) *Concise Oxford English Dictionary* (11th ed 2006) 525 the term "feu" in Scots Law is defined as a perpetual lease at a fixed rent, a piece of land held by such a lease.
[167] *Hill v Maclaren* (1879) 6 R 1363 at 1364.
[168] *Hill v Maclaren* (1879) 6 R 1363 at 1365.
[169] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.41.
[170] *Hill v Maclaren* (1879) 6 R 1363 at 1366.
[171] *Hill v Maclaren* (1879) 6 R 1363 at 1366.
[172] *Hill v Maclaren* (1879) 6 R 1363 at 1366.

original one.[173] The owner of the dominant estate is entitled to claim his contractual right.[174] The judge decided this case in favour of the owner of the dominant estate and decided that if the owner of the servient estate is entitled to relocate a specified servitude of right of way it would lead to a gradual destabilisation of property rights.[175] It was also held that the 18th century authorities were "doubtful" and that the proposed right of way was not as convenient and desirable as the original one.[176] Lovett[177] states that it is quite curious that none of the judges cited a single authority to justify the new approach adopted by them, other than the two 18th century decisions whose rules are ignored and distinguished.

In *Thompson's Trustees v Findlay*[178] the owner of the servient estate sought to relocate a servitude. The route was specified in the contract. The owner of the servient estate sought to relocate the route because the original route blocked them from going ahead with their development. The Inner House stated that the owner of the servient estate is entitled to relocate the servitude because *Hill*[179] did not eliminate all utilitarian based claims to alter a servitude of passage over a fixed line.[180] The court also stated that the extent of the relocation would only be "slight and harmless".[181] Furthermore, it was said that the owner of the dominant tenement's rights could not be exercised to affect a development.[182]

In *Moyes v McDiarmid*[183] (*Moyes*) the trial court rejected the approach followed in *Hill*.[184] In *Moyes* the owner of the servient estate sought authority to erect buildings on a servitude whose route had been "minutely described as to breadth and direction" and "to substitute another at one side".[185] The Dean of Guild refused the objections made by the owner of the dominant tenement and held that the original route created a disadvantage to Moyes

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[173] *Hill v Maclaren* (1879) 6 R 1363 at 1366.
[174] *Hill v Maclaren* (1879) 6 R 1363 at 1366.
[175] *Hill v Maclaren* (1879) 6 R 1363 at 1366-1367.
[176] *Hill v Maclaren* (1879) 6 R 1363 at 1366-1367.
[177] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 371.
[178] (1898) 25 R 407.
[179] *Hill v Maclaren* (1879) 6 R 1363.
[180] *Thompson's Trustees v Findlay* (1898) 25 R 407 at 410.
[181] *Thompson's Trustees v Findlay* (1898) 25 R 407 at 411.
[182] *Thompson's Trustees v Findlay* (1898) 25 R 407 at 411.
[183] (1900) 2 F 918.
[184] *Hill v Maclaren* (1879) 6 R 1363.
[185] *Moyes v McDiarmid* (1900) 2 F 918 at 918-919.

because it divided her property into two portions.[186] The court also held that the substitute route was equally commodious and convenient to the respondent as the existing route.[187] Lord President Balfour drew a distinction between indefinite servitudes of rights of way and those that were created by prescriptive use on the one hand and those servitudes that were specified and defined in the deed on the other.[188] The Court of Session reversed the decision. According to Lord President Balfour, he was unable to see any reason why the contract as it is contained in the titles should not be enforced according to its terms as any other lawful contract.[189] Lord President Balfour also stated that where the parties have insisted upon a specified servitude of right of way in their contractual agreement, the specified route must be regarded as the essence of the contract.[190]

The following part of the chapter will evaluate the arguments justifying the application of the majority and the minority approach pertaining to the unilateral relocation of servitudes in Scotland. If the abovementioned early and later arguments concerning the unilateral relocation of a specified servitude of right of way are taken into consideration as it is applied in the Scots law, a distinction can be drawn between a majority approach and a minority approach regarding the unilateral relocation of a specified servitude of right of way.[191] The majority approach is illustrated clearly in *Hill*[192] and *Moyes*.[193] The majority view holds that the owner of the servient estate may not unilaterally alter the route or width of the servitude without the consent of the owner of the dominant estate because the owner of the dominant tenement retains an interest in the existing route of the servitude.[194] The minority view is expressed in *Hill*.[195] The minority approach suggests that the owner of the servient estate may seek a declaratory order from the court to have the servitude varied even if the owner of the dominant estate retains an interest in the servient tenement

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[186] *Moyes v McDiarmid* (1900) 2 F 918 at 919.
[187] *Moyes v McDiarmid* (1900) 2 F 918 at 919.
[188] *Moyes v McDiarmid* (1900) 2 F 918 at 922-923.
[189] *Moyes v McDiarmid* (1900) 2 F 918 at 921.
[190] *Moyes v McDiarmid* (1900) 2 F 918 at 921.
[191] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.43.
[192] *Hill v Maclaren* (1879) 6 R 1363.
[193] *Moyes v McDiarmid* (1900) 2 F 918.
[194] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.43.
[195] *Hill v Maclaren* (1879) 6 R 1363. This case and comments on it are discussed below.

and even if the owner of the dominant tenement refuses to consent to the proposed variation.[196]

According to Cuisine and Paisley, an objection to the majority approach may be raised with regard to the interest to enforce the contractual obligation not to vary the route as binding on the successors of the owner of the servient estate.[197] Cuisine and Paisley[198] stated that it is difficult to see why the successor in title of the owner of the dominant estate should be presumed to have the same interest to enforce the obligation as the first dominant proprietor in respect of the servitude.[199] Cuisine and Paisley refer to Gordon's[200] statement to justify their objection. Gordon states that it is questionable whether a contract that has been drafted years ago by other parties should be enforced strictly in accordance with its terms.[201] He states that if the route has been specified in the contract, then this will be a valid argument for holding the parties to it.[202] However, he also says that it is not unreasonable to require an objecting dominant owner to show an interest in objecting to the relocation of the servitude rather than presuming that the interest of the original party still exists.[203] The dominant owner could for example object that the new passage is going to be substantially more inconvenient or that no offer has been made to constitute his right properly.[204]

The second objection to the majority's approach is that it benefits the owner of the dominant estate, because the owner of the dominant estate cannot be compelled to accept a relocation of the route of a servitude even if the owner of the servient estate can provide a route which is equally commodious to the owner of the dominant estate.[205] The interests of the owner of the servient estate may in certain circumstances require flexibility, especially in cases where the servient tenement should be redeveloped. The interests of the owner of the servient estate are accommodated by the statutory provisions which

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[196] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.43.
[197] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.50.
[198] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.49.
[199] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.50.
[200] Gordon WM *Scottish Land Law* (1989) paras 24-66. See Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.50.
[201] Gordon WM *Scottish Land Law* (1989) para 24-66.
[202] Gordon WM *Scottish Land Law* (1989) para 24-66.
[203] Gordon WM *Scottish Land Law* (1989) para 24-66.
[204] Gordon WM *Scottish Land Law* (1989) para 24-66.
[205] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.52.

permit variation by the Lands Tribunal.[206] Cuisine and Paisley state that even though the majority approach benefits the owner of the dominant estate, it should not be taken to suggest that, where the line and width of a servitude has been expressly stated in the deed, evidence of convenience or prejudice arising from a proposed variation is rendered irrelevant.[207]

According to Cuisine and Paisley,[208] the minority approach is not likely to be applied in Scots law. The minority view is expressed in *Hill*.[209] In this case, Lord Gifford asserted that the owner of the servient estate should have the opportunity to relocate a servitude even if the owner of the dominant estate is reluctant to consent to the relocation.[210] According to Lord Gifford, the owner of the servient estate could seek a declaratory order from court that would entitle him to relocate the route provided that sufficient grounds are established by the owner of the servient estate.[211] Sufficient grounds will include grounds of necessity or grounds that are of manifest convenience to the servient tenement, but without detriment to the owner of the dominant estate.[212] The court will interfere and determine what the substitute line of the route should be like.[213] Furthermore, Lord Gifford stated that when the owner of the servient estate has specified the route of the servitude in an onerous contract, which has been acted on, the owner of the servient estate will not be allowed to take the law into his own hands by relocating the route of the servitude.[214] In the *Hill* case, Lord Gifford stated that the owner of the servient estate did not establish reasonable grounds that allowed him to relocate the original servitude and provide an alternative route.[215] To summarise, according to the approach of Lord Gifford, the owner of the servient estate may be entitled to relocate a servitude, even if the owner of the

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[206] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.52.
[207] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.52.
[208] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.43.
[209] *Hill v Maclaren* (1879) 6 R 1363 at 1368.
[210] *Hill v Maclaren* (1879) 6 R 1363 at 1368. See Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.55.
[211] *Hill v Maclaren* (1879) 6 R 1363 at 1368. See Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.55.
[212] *Hill v Maclaren* (1879) 6 R 1363 at 1368.
[213] *Hill v Maclaren* (1879) 6 R 1363 at 1368. See Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.55.
[214] *Hill v Maclaren* (1879) 6 R 1363 at 1368.
[215] *Hill v Maclaren* (1879) 6 R 1363 at 1368.

dominant estate should retain an interest in a particular line of such a servitude, provided that the owner of the servient estate can provide sufficient grounds for the relocation.[216]

According to Cuisine and Paisley,[217] this dictum of Lord Gifford is confusing. Cuisine and Paisley state that even though this dictum was approved by Lord President Balfour in *Moyes*,[218] Lord President Balfour also approved and applied the majority approach followed by Lord Justice-Clerk Moncreiff in the *Hill*[219] case. Therefore, Cuisine and Paisley argue that the weight that may be given to the minority view set out by Lord Gifford is unclear.[220] They also caution against any reliance on the dictum because of this uncertainty. According to Cuisine and Paisley,[221] the balance of authority indicates that at common law there is no implied right to relocate the route of a servitude, especially where the servitude has been established by express written provisions. However, this implied right is qualified by the recognition that the route of a servitude may be relocated if the owner of the dominant estate has no interest in the existing route.[222]

Cuisine and Paisley[223] suggest that the risks involved in reliance on the possibility that the minority approach would be adopted by the courts are likely to lead the servient owner to make an application for the variation of the servitude to the Lands Tribunal.[224]

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[216] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.55.
[217] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.55.
[218] *Moyes v McDiarmid* (1900) 2 F 918 at 924.
[219] *Hill v Maclaren* (1879) 6 R 1363.
[220] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.57.
[221] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.55.
[222] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.55.
[223] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.43.
[224] In terms of Part I of the Conveyancing and Feudal Reform (Scotland) Act 1970, the burdened servient owner can apply to the Lands Tribunal for a variation of a servitutal right. The servient owner can apply to the Lands Tribunal even in cases where unilateral relocation at common law is not available. *Munro v McClintock* 1996 SLT (Sh Ct) 97 at 101. See Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.76. The right of the servient owner to have resort to the Conveyancing and Feudal Reform (Scotland) Act 1970 cannot be restricted or excluded by an agreement. S 7 of the Conveyancing and Feudal Reform (Scotland) Act 1970. See Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.77. The statutory provisions in the Conveyancing and Feudal Reform (Scotland) Act 1970 does not authorise the servient owner to obtain a variation of the servitude for reasons which the servient owner in his own opinion regard as sufficient. The tribunal may only discharge a land obligation on the establishment of one or more of the three grounds set out in the legislation. *Spafford v Brydon* 1991 SLT (Lands Tr) 49. See Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.78. The tribunal has discretion not to discharge or vary the servitude even if one or all of the grounds is established. Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.78. None of the three statutory grounds imposes an express requirement that the new route should always be equally convenient when compared to the old route. Where the new proposed route is less convenient than the old one, the payment of compensation may be ordered for any substantial loss suffered by the dominant owner. Cuisine DJ & Paisley RRM *Servitudes and Rights of Way*

Finally, the modern composite approach acknowledges that parties may exclude the right to vary the route of a servitude in cases where there has been an express statement regarding the precision of the line and width of the route.[225] However, Cuisine and Paisley assert that even if there should be a precise statement of the width and line of the route, the authority to relocate the route of the servitude may be reserved expressly to the owner of the servient estate by means of a suitably worded servitude condition.[226] Furthermore, Cuisine and Paisley[227] mention that in many deeds granted with regard to servient tenements that are most likely to be developed in the foreseeable future, an express declaration exists that provides that the servitude of access granted should not be exercised in any manner that impedes or restricts the development to be carried out on the servient tenement. Cuisine and Paisley[228] argue that such a declaration is adequate to exclude the contractual implication which provides that the route of the servitude cannot be relocated unilaterally by the owner of the servient estate.

The modern composite approach defined by Cuisine and Paisley[229] regarding the legal principles on the relocation of a specified servitude of right of way can be categorised as a combination of the early and the later approaches.[230] The legal position pertaining to the unilateral relocation of a specified servitude of right of way in Scots law is unclear as there is no uniform legal principle. The early common law approach, namely that the owner of the servient estate is entitled to alter the route of the servitude, provided that the adjustment did not materially interfere with the legitimate exercise of the rights of the

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(1998) para 12.79. The tribunal may refuse to vary the route if the sum of money would not be adequate compensation for the loss suffered by the dominant owner. S 1(4) Conveyancing and Feudal Reform (Scotland) Act 1970. See Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.79. According to Cuisine and Paisley, the common law power to relocate a servitude is still attractive to the servient owner for a number of reasons. In the first instance, it may be exercised in cases where application to the Lands Tribunal is excluded. Secondly, if the relocation of the servitude is non-material, it can be carried out speedily without having to obtain an order from court or an application to a tribunal. Finally, the common law right to relocate the servitude may be exercised without having to establish any statutory ground of variation, provided that the alteration does not prejudice the dominant owner. However, the main defect of a variation under the common law entails that where the servient owner exercises the right without obtaining judicial consent, the servient owner will run the risk that he exceeded his rights. The dominant owner may institute a claim for damages or an interdict. Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.80.

[225] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.53.
[226] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.53.
[227] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.53.
[228] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.53.
[229] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.42.
[230] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.42.

owner of the dominant estate, remains authoritative in Scots law but within certain limitations.[231] In some instances the later approach will be applicable, which is based on drawing a distinction between servitudes where the route is specified in a deed and those where it is not.[232] Once the route has been specified, the owner of the dominant estate is regarded as being in a stronger position.[233] The owner of the servient estate is not entitled to relocate the servitude unilaterally, once the servitude of right of way is specified.

3.6 English law

In England, the common law rule pertaining to the unilateral relocation of servitudes is that once the location of an easement has been specified by contract or usage, the owner of the servient estate will have no right to alter or deviate from the line, unless that right has been expressly reserved by agreement.[234] The width of the right of way is of vital importance.[235] A wrongful interference with a private right of way is a nuisance in relation to which either damages or an injunction (or both) may be sought.[236] However, every form of interference is not actionable.[237] Minor interferences or alterations to the servient estate have to be tolerated, but action can be taken against any substantial interference[238] with the right granted. The interference will be regarded as substantial where the conduct interferes with the owner of the dominant estate's reasonable use of the right of way.[239] The test whether an interference is actionable does not depend on whether what the dominant owner is left with is reasonable, but whether his insistence on being able to

[231] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.42.
[232] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.42.
[233] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.42.
[234] Sparkes P *A New Land Law* (2nd ed 2003) para 32.03; Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 359.
[235] Sparkes P *A New Land Law* (2nd ed 2003) para 32.03.
[236] Gray K *Elements of Land Law* (1987) 662.
[237] Gray K *Elements of Land Law* (1987) 662. See *Celsteel Ltd v Alton House Holdings Ltd* [1985] 1 WLR 204 at 216.
[238] Harpum C, Bridge S & Dixon M *The Law of Real Property* (7th ed 2008) paras 30-003 – 30-004; *Pettey v Parsons* [1914] 2 Ch 653 at 662, 665 ("The plaintiff cannot complain, unless he can prove an obstruction which injures him"); *Keefe v Amor* [1965] 1 QB 334 at 347.
[239] Harpum C, Bridge S & Dixon M *The Law of Real Property* (7th ed 2008) paras 30-003 – 30-004; *Keefe v Amor* [1965] 1 QB 334 at 347.

continue to use the whole of what was contracted for is reasonable.[240] Examples of substantial interferences are the narrowing of the right of way[241] and restricting the height of a right of way.[242] There may be a remedy where the width of the way is more than halved.[243] Alterations may only be allowed if such a right has been reserved.[244] No right to deviate from the line of a right of way exists.[245] The owner of the servient estate has no right to alter the route of a right of way unless the right of the owner of the servient estate to do so was expressly or impliedly granted to him either by the grant or reservation of the easement or by subsequent agreement.[246] Whether an alteration of a right of way will in all cases be an actionable interference, even if the alteration is equally convenient to the owner of the servient estate, has not been settled.[247]

In *Greenwich Healthcare NHS Trust v London and Quadrant Housing Trust*,[248] the plaintiff acquired land. The land included a road connecting it with a highway in order to build a hospital. The development was approved. However, the development was subject to a condition that a new road and new junction with the public highway be completed before the hospital could open. The plaintiff had to realign the road. However, this road was used by the defendants as a right of way. The land was also subject to a restrictive covenant limiting its use. The defendants were given notice about the proposed development, but none of the parties had objected to it. No reasonable objection could be made to the realignment of the right of way because the purpose of the realignment was to improve the safety and convenience of access to the public highway. The plaintiffs applied for declarations that they were entitled to realign the right of way and that the defendants were not entitled to an interdict to restrain the proposed realignment, but that their rights were limited to an award of damages with regard to any interference with the right of way. The

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[240] Harpum C, Bridge S & Dixon M *The Law of Real Property* (7th ed 2008) 1292-1293 paras 30-003 – 30-004.
[241] *B & Q v Liverpool & Lancashire Properties* [2001] 1 EGLR 92.
[242] *VT engineering v Richard Barland & Co* (1968) 19 P & CR 890.
[243] Gray K *Elements of Land Law* (1987) 663. See also *Celsteel Ltd v Alton House Holdings Ltd* [1985] 1 WLR 204 at 218.
[244] *Overcom Properties v Stockleigh Hall Resident Management* [1989] 1 ELGR 75 CA. Complete removal of a promised right may be a derogation from grant: *Saeed v Plustrade* [2001] EWCA Civ 2011 [2002] 2 EGLR 19. See Sparkes P *A New Land Law* (2nd ed 2003) para 32.03
[245] *Bullard v Harrison* (1815) 4 M & S 387, 105 ER 877; *Selby v Nettlefold* (1873) LR 9 Ch App 111.
[246] Harpum C, Bridge S & Dixon M *The Law of Real Property* (7th ed 2008) paras 30-003 – 30-004; *Greenwich Healthcare NHS Trust v London and Quadrant Housing Trust* [1998] 1 WLR 1749.
[247] Harpum C, Bridge S & Dixon M *The Law of Real Property* (7th ed 2008) paras 30-003 – 30-004.
[248] [1998] 1 WLR 1749.

court held that in general the owner of the servient estate had no right to alter the route of an easement of way, unless the right of the owner of the servient estate to do so had been expressly or impliedly granted to him.[249] The court held that the defendants should be satisfied with and restricted to an award of damages.[250]

The English law pertaining to the unilateral relocation of servitudes may be summarised as follows: No right to deviate from the line of a right of way exists.[251] The owner of the servient estate has no right to alter the route of a right of way unless the right of the owner of the servient estate to do so has been expressly or impliedly granted to him either by the grant or reservation of the easement or by subsequent agreement.[252]

3.7 Conclusion

The court in *Linvestment* provided comparative reasons to justify its departure from the common law position. Instead of using primary sources, the court merely used secondary sources without any discussion regarding their comparative value or context. The court referred to the *Ontwerp* of Professor Meijers,[253] who stated that many foreign codes, including Switzerland, Italy and Greece, recognise the unilateral relocation of a specified servitude of right of way, provided that the servient owner proves that the dominant owner's servitutal rights will not be reduced.[254] Furthermore, the court referred briefly to the Belgian Civil Code and the German Civil Code, as well as the discussion of the Scots law by Cuisine and Paisley.[255] The comparative reasons provided for the decision are insufficient because the court failed to provide a context that could explain the reasons for following a flexible approach and the conditions under which it is applied.

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[249] *Greenwich Healthcare NHS Trust v London and Quadrant Housing Trust* [1998] 1 WLR 1754-1755.
[250] *Greenwich Healthcare NHS Trust v London and Quadrant Housing Trust* [1998] 1 WLR 1754-1755.
[251] *Bullard v Harrison* (1815) 4 M & S 387, 105 ER 877; *Selby v Nettlefold* (1873) LR 9 Ch App 111.
[252] Harpum C, Bridge S & Dixon M *The Law of Real Property* (7th ed 2008) paras 30-003 – 30-004; *Greenwich Healthcare NHS Trust v London and Quadrant Housing Trust* [1998] 1 WLR 1749.
[253] Meijers EM *Ontwerp voor een Nieuw Burgerlijk Wetboek 2 Toelichting* (Book 5) (1955) at 428. See footnote 32 in *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 27. This research did not focus on the Italian, Swiss and Greek law due to the language barrier.
[254] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA).
[255] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 28-29.

Unlike the *Linvestment* judgment, this chapter aims to provide a more contextual comparative analysis to illustrate how different jurisdictions address the issue concerning the relocation of a specified servitude of right of way. Comparative research between legal cultures without direct historical relationships can be fruitful and enriching.[256] The chapter focuses on Dutch, German, US (particularly Louisiana), Scots and English law because most of these jurisdictions illustrate that a flexible approach to the relocation of servitudes is preferred.

Dutch law follows a flexible legal approach with regard to the relocation of a specified servitude of right of way. Dutch law provides that the owner of the servitude may relocate a servitude, provided that it does not lessen the utility of the dominant estate.[257] The owner of the servient estate will be held liable for any expenses.[258] The law also states that the owner of the dominant estate may be compelled to cooperate with the owner of the servient estate unless he is prejudiced by such relocation. It is not necessary for the owner of the servient estate to obtain a court order if the relocation is reasonable and fair.[259] If the legal issue should reach the court then the court may modify the easement in the case of unforeseen circumstances which are of such a nature that the owner of the servient estate cannot be required to maintain the easement unchanged.[260] The burden of proof will rest on the owner of the dominant estate to prove that the alternative route is inconvenient.[261] If the interests of the dominant estate are diminished the court may alter the contents of an easement upon the demand of the owner of the dominant estate to such an extent that the possibility of the exercise of the servitutal rights is restored.[262] The approach followed in Dutch law is similar to the approach adopted in *Linvestment.* However, unlike the

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[256] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 354.
[257] BW 5:73 par 2. See Warendorf H, Thomas R & Curry-Sumner I "Book 5 Title 6 Easements" in *The Civil Code of the Netherlands* (2009) 599-640 at 615.
[258] BW 5:73 par 2. See Warendorf H, Thomas R & Curry-Sumner I "Book 5 Title 6 Easements" in *The Civil Code of the Netherlands* (2009) 599-640 at 615.
[259] Rb 's Gravenhage (pres) 25 November 1999, KG 2000, 2.
[260] BW 5:78. See Warendorf H, Thomas R & Curry-Sumner I "Book 5 Title 6 Easements" in *The Civil Code of the Netherlands* (2009) 599-640 at 617. See Mijnssen FHJ, Bartels SE & Van Velten AA *Mr C Assers Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht* vol 5 *Zakenrecht Eigendom en Beperkte Rechten* (15th ed 2008) 185.
[261] HR 22 Maart 1872 *W* 3444.
[262] BW 5:80. See Warendorf H, Thomas R & Curry-Sumner I "Book 5 Title 6 Easements" in *The Civil Code of the Netherlands* (2009) 599-640 at 617. See Mijnssen FHJ, Bartels SE & Van Velten AA *Mr C Assers Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht* vol 5 *Zakenrecht Eigendom en Beperkte Rechten* (15th ed 2008) 201.

Linvestment judgment, the provisions in the Dutch Civil Code pertaining to the relocation of a specified servitude of right of way sets out the legal position more systematically. In *Linvestment*, the court only mentions the criteria that the servient owner should comply with in order to relocate a servitude unilaterally. The Dutch Civil Code does not only state the requirements that should be complied with, it also illustrates when judicial consent should be obtained by the servient owner, it specifies on whom the burden of proof will rest and the Dutch Civil Code also indicates the circumstances in which a servient owner will be ordered to restore the servitude to its original position.

German law also follows a flexible approach. The German Civil Code provides that the unilateral relocation of a specified servitude is possible, provided that the owner of the servient estate will provide an alternative route which is equally suitable.[263] The owner of the servient estate will only be able to relocate the servitude if the current route is onerous to him.[264] The owner of the servient estate will have to pay for all the expenses regarding the relocation of a servitude. However, unlike the South African and Dutch legal systems, the German Civil Code contains a provision which states that the right to removal cannot be excluded or limited by legal transaction.[265] It seems as though, on an interpretation of the outcome of the provisions in the German Civil Code, the courts will be entitled to interfere with the initial agreement between the contracting parties if a situation changes unfairly towards one of the contracting parties.

Unlike the South African, Dutch and German legal systems the US does not have a uniform legal system regarding the relocation of a specified servitude of right of way. Some states in the US follow a strict common law approach, whereas other states follow a flexible approach pertaining to the relocation of a specified servitude of right of way. Traditionally, the courts in the US have not allowed the owner of the servient estate to relocate the easement unilaterally without obtaining the necessary consent from the easement owner. The traditional common law approach in the US is similar to the South African legal position prior to the *Linvestment* Supreme Court of Appeal judgment.

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[263] Forrester IS, Goren SL & Ilgen HM *The German Civil Code* Book 1-5 (as amended to January 1, 1975) Book 3: § 1023 at 169.
[264] Forrester IS, Goren SL & Ilgen HM *The German Civil Code* Book 1-5 (as amended to January 1, 1975) Book 3: § 1023 at 169.
[265] Forrester IS, Goren SL & Ilgen HM *The German Civil Code* Book 1-5 (as amended to January 1, 1975) Book 3: § 1023 at 169.

Louisiana was the first state in the US to acknowledge the unilateral relocation of a specified servitude of right of way. The flexible legal approach in Louisiana is similar to the approach adopted in *Linvestment*. The Louisiana rule regarding the role of servitude relocation was adopted by the American Law Institute's Restatement (Third) of Property (Servitudes) § 4.8 (2000) as the proposed new default rule for the relocation of servitudes.[266] During the last couple of years the leading courts in four common law states (Colorado, South Dakota, New York, and Massachusetts) adopted the Restatement's rule, which was originally borrowed from the Louisiana Civil Code.[267] There are various debates in the US in favour of the new default rule and debates which are against the application of the new default rule.[268] Singer[269] is correct in stating that there is no easy answer to this rule choice because it turns on different ways to measure the value of the respective interests and on competing conceptions of the entitlements or rights in question.

Compared to the South African, Dutch, German, US and English law, the Scots law is less clear regarding the legal position on the relocation of a specified servitude of right of way, but there are strong arguments in favour of the unilateral relocation of a specified servitude of right of way. The legal approach followed in the Scots law can be divided in three different timelines, namely an early approach, a later approach and a modern composite approach.[270] The early common law approach was that the owner of the servient estate is entitled to alter the route of the servitude, provided that the adjustment does not materially interfere with the legitimate exercise of the rights of the owner of the dominant estate.[271] The later approach can be summarised as a much stronger preference for contract-

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[266] See *Restatement (Third) of Property: Servitudes* § 4.8(3) (2000). Comment (f) notes that s 4.8(3) "adopts the civil law rule that is in effect in Louisiana and a few other states". This rule was proposed for the first time in a tentative draft of chapter 4 of the Restatement in 1994. See also Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 359.

[267] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 358); citing *Stanga v Husman* 694 NW 2d 716 (SD 2005) 718-720; *LLC v Dwyer* 809 NE 2d 1053 (Mass 2004) 1057; *Lewis v Young* 705 NE 2d 649 (NY 1998) 653-654; *Roaring Fork Club LP v St Judes Co* 36 P 3d 1229 (Colo 2001) 1237.

[268] See French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1 – 15 and Orth JV "Relocating easements: A response to Professor French" (2004) 38 *Real Prop Prob & Tr* 643-654.

[269] Singer JW *Introduction to Property* (2nd ed 2005) 223.

[270] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) paras 12.37-12.80.

[271] Bell GJ & Guthrie W *Principles of the Law of Scotland* (10th ed 1899) § 987 and § 1010; Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.37.

oriented certainty. The modern composite approach as defined by Cuisine and Paisley,[272] regarding the legal principles on the relocation of a specified servitude of right of way, can be categorised as a combination of the early and the later approaches.[273] The early approach as discussed above remains authoritative, within certain limitations.[274] The later approach is based on drawing a distinction between servitudes where the route is specified in a deed and those where it is not. Once the route has been specified, the owner of the dominant estate is regarded as being in a stronger position.[275]

English law pertaining to the unilateral relocation of servitudes is not as flexible as the approach followed in the South African, Dutch, German and US law. The position in English law is that once the location of an easement has been specified by contract or usage, the owner of the servient estate will have no right to alter or deviate from the line unless that right has been expressly reserved by agreement.[276] Alterations may only be allowed if such a right has been reserved.[277]

Even though most of these jurisdictions do not have any historical relationships, the discussion of each jurisdiction can be regarded as fruitful because it enhances law reform. The flexible legal approach is welcomed and to a certain extent convincing, as the law cannot remain rigid and needs to be continually changed in order to meet changing conditions. Even though this comparative analysis is limited, it is more contextual than the comparative discussion provided in the *Linvestment* judgment. The comparative analysis reaches the same result as the court in *Linvestment* and therefore confirms the court's result.

Although some of the abovementioned jurisdictions illustrate that widespread practice favours a flexible approach to the relocation of servitudes, the judge in *Linvestment* failed to test the constitutional implications that the flexible legal approach may have for the dominant owner. The following chapter will assess the constitutional implications regarding

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[272] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.42.
[273] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.42.
[274] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.42.
[275] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.42.
[276] Sparkes P *A New Land Law* (2nd ed 2003) para 32.03; Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 359.
[277] *Overcom Properties v Stockleigh Hall Resident Management* [1989] 1 ELGR 75 CA. Complete removal of a promised right may be a derogation from grant: *Saeed v Plustrade* [2001] EWCA Civ 2011 [2002] 2 EGLR 19. See Sparkes P *A New Land Law* (2nd ed 2003) para 32.03.

the application of a flexible legal approach pertaining to the unilateral relocation of a specified servitude of right of way.

Chapter 4: Constitutional Analysis

4.1 Introduction

When developing the common law, the courts must determine whether the common law is inadequate when measured against the objectives of section 39(2). When the common law is deficient, the courts have to determine what ought to be done to meet those objectives.[1]

When giving content to the common law principles, the courts should ensure that the common law reflects the spirit, purport and objectives of the Bill of Rights.[2] In this chapter, the constitutional implications of the judgment in *Linvestment*[3] will be evaluated. The first constitutional aspect in *Linvestment* concerns section 25(1) of the Constitution, which contains the deprivation provision of the property clause. This subsection provides that no one may be deprived of property, except in terms of law of general application; and no law may permit arbitrary deprivation of property. The test for arbitrary deprivation was set out in *First National Bank of SA Ltd t/a Wesbank v Commisioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance.*[4] According to this decision, a deprivation of property is regarded as "arbitrary" in terms of section 25 when there is not a sufficient reason for the particular deprivation or if it is procedurally

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[1] Section 39(2) of the Constitution requires that every court must promote the spirit, purport and objects of the Bill of Rights. In *Thebus and Another v S* 2003 (10) BCLR 1100 (CC) para 27 Moseneke J noted that "this section does not specify what triggers the need to develop the common law or in which circumstances the development of the common law is justified". Moseneke J referred to *Carmichele v Minister of Safety and Security and Another* 2001 (10) BCLR 995 (CC) in which the court recognised that there are different ways to develop the common law under section 39(2) of the Constitution. Moseneke J noted in *Thebus and Another v S* 2003 (10) BCLR 1100 (CC) para 28 that two instances may trigger the need to develop the common law under section 39(2) of the Constitution. The first instance would be when the common law rule is inconsistent with a constitutional provision. The second instance that will trigger the development of the common law is when the particular rule falls short of the spirit, purport and objects of the Constitution even if the common law rule is not inconsistent with the constitutional provision. In such circumstances, the common law must be adapted in order to bring it in line with the "objective normative value system" found in the Constitution. See Van der Walt AJ *Constitutional Property Law* (2005) 446-447. In *Linvestment CC v Hammersley & Another* [2008] 2 All SA 493 (SCA) para 31 the court held that the interests of justice required a revision of the common law relating to servitudes. Heher JA said: "Servitudes are by their nature often the creation of preceding generations devised in another time to serve ends which must now be satisfied in a different environment. Imagine a right of way over a farm portion registered fifty years ago. Since then new public roads have been created providing new access to the dominant tenement, the nature of the environment has changed, the contracting parties have long gone. Properly regulated flexibility will not set an unhealthy precedent or encourage abuse. Nor will it cheapen the value of registered title or prejudice third parties."

[2] Midgley JR & Van der Walt JC "Delict" in Joubert WA (ed) *LAWSA* vol 8(1) (2005) 23.

[3] *Linvestment CC v Hammersley and Another* [2008] 2 All SA 493 (SCA).

[4] 2002 (4) SA 768 (CC).

unfair.[5] When applying the test for arbitrary deprivation to *Linvestment*, the question is whether the result of the *Linvestment* judgment, namely that a specified servitude of right of way may be relocated unilaterally, constitutes an arbitrary deprivation of property of the dominant estate owner, which may be in conflict with section 25(1) of the Constitution. This first question is discussed in 4.2 below.

A second constitutional aspect of the decision in *Linvestment* is the question whether the decision and the possibility that a specified servitude of right of way may be relocated unilaterally could constitute an expropriation of property (particularly expropriation of the rights of the owner of the dominant tenement) and if so, whether such expropriation is in conflict with sections 25(2) and 25(3) of the Constitution. This second question is discussed in 4.3 below.

Linvestment deals with a private dispute between private parties regulated by the common law. Before the owner of the dominant estate could succeed with an argument that the decision in *Linvestment* may amount to an arbitrary deprivation or unconstitutional expropriation, it will have to be shown that this private legal dispute has constitutional relevance and that section 25 is applicable. The following paragraphs will discuss the requirements that have to be complied with before the provisions in the Bill of Rights may be applicable to a private law dispute.

Similar to other provisions entrenched in the Bill of Rights, section 25 of the Constitution is subject to section 8 of the 1996 Constitution. This provision regulates the applicability of all the rights entrenched in the Bill of Rights. Section 8(1) of the Constitution provides that the Bill of Rights applies to all law, which includes all forms of legislation, common law and customary law.[6] In addition, section 8(1) states that state institutions are bound by the Bill of Rights. The fact that the provision states nothing about private individuals may suggest that constitutional rights do not bind private individuals to the same extent as the state,[7] but section 8(2) of the Constitution provides that a provision of the Bill of Rights may also

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[5] *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.
[6] Van der Walt AJ *Constitutional Property Law* (2005) 43; Du Bois F "Sources of law: Overview and Constitution" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 33-45 at 39.
[7] Du Bois F "Sources of law: Overview and Constitution" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 33-45 at 39.

bind a natural or a juristic person if, and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.[8] Section 8(3) adds a further qualification to section 8(2) of the Constitution. It states that when the provisions of the Bill of Rights are applied to natural and juristic persons in terms of section 8(2), a court must apply or where necessary, develop the common law to the extent that legislation does not give effect to that right;[9] and may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).[10]

The 1996 Constitution favours the indirect horizontal application of the Bill of Rights.[11] In order to bring the adjudication of private disputes in line with the Constitution, the indirect horizontal application of section 25 may be used to develop the common law in light of section 25 and interpret legislation to bring it in conformity with section 25. When the Bill of Rights is applied indirectly, the Bill of Rights will not necessarily override ordinary law, but will demand furtherance of its values mediated through the operation of ordinary law.[12]

Roux[13] states that it is not necessary for the court to apply section 25 directly if private actors argue that the common law has the effect of depriving them of their property. Section 173 of the Constitution authorises High Courts, the Supreme Court of Appeal and the Constitutional Court to develop the common law. If a court addresses a legal dispute

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[8] See Van der Walt AJ *Constitutional Property Law* (2005) 43-46. Currie I & De Waal J *The Bill of Rights Handbook* (5th ed 2005) 53: It is possible that some provisions entrenched in the Constitution may apply to the conduct of private individuals while other provisions in the same section will not apply to such conduct. The example mentioned by the authors that does not apply directly to private legal disputes is section 27(1), the right of access to health care services. The reason why this provision cannot apply horizontally to private legal disputes is because the duty imposed by the right is too burdensome to impose it on private individuals. See *Afrox Healthcare Beperk v Strydom* 2002 (6) SA 21 (SCA) para 15. However, section 27(3), the right not to be refused emergency medical treatment, will most probably apply horizontally. Whether a provision in the Bill of Rights is applicable to private individuals will depend on the context within which it is sought to be relied on.

[9] Section 8(3)(a) of the Constitution.

[10] Section 8(3)(b) of the Constitution.

[11] Van der Walt AJ *Constitutional Property Law* (2005) 45. The direct horizontal application of the Constitution means that "private persons could rely directly on a provision in the Constitution to found a cause of action for a constitutional attack on another private party in a private dispute". Van der Walt AJ *Constitutional Property Law* (2005) 45.The direct horizontal application of provisions in the Bill of Rights may be appropriate in some cases, but in most cases, where the Constitution has an impact on private disputes, the Bill of Rights will most likely be applied indirectly. Van der Walt AJ *Contstitutional Property Law* (2005) 45; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 526; Du Bois F "Sources of law: Overview and Constitution" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 33-45 at 39.

[12] Currie I & De Waal J *The Bill of Rights Handbook* (5th ed 2005) 32.

[13] Roux T "Property" in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2009 original service December 2003) 46-1 – 46-35 at 46-7.

pertaining to the arbitrary deprivation of property sanctioned by the common law, the courts are authorised to develop the common law in order to achieve a just result.[14] Section 39(2) of the Constitution obliges courts to "promote the spirit, purport and objects of the Bill of Rights"[15] Roux suggests that since the objects of the Bill of Rights are to protect people against arbitrary deprivation of property, "it would seldom be necessary to consider whether section 25 [i]s directly applicable to the case".[16]

The application of the abovementioned legal principles to the dispute in *Linvestment*[17] creates the impression that the decision reached in *Linvestment* is constitutionally relevant despite the fact that the *Linvestment* decision deals with a private law dispute.

This chapter will argue that *Linvestment*[18] concerned the development of a common law principle which infringes the property right of the owner of the dominant estate. It is clear from the abovementioned legal principles that section 25 will be indirectly applicable to the private legal dispute, since the constitutionality of a common law principle is challenged in terms of the property clause.[19]

4.2 The deprivation provision: Section 25 (1)

4.2.1 Introduction

The preceding passage established that section 25 of the Constitution applies to the private legal dispute in *Linvestment*. The aim of the next part of the chapter is to determine

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[14] Roux T "Property" in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2009 original service December 2003) 46-1 – 46-35 at 46-7.
[15] Roux T "Property" in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2009 original service December 2003) 46-1 – 46-35 at 46-7.
[16] Roux T "Property" in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2009 original service December 2003) 46-1 – 46-35 at 46-7.
[17] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA).
[18] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA).
[19] See Van der Walt AJ *Constitutional Property Law* (2005) 43-46 and Du Bois F "Sources of law: Overview and Constitution" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 33-45 at 39. *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) held that where the common law regulates disputes between private individuals, the Bill of Rights entrenched in the interim Constitution can only be applied indirectly to the private legal dispute. This decision still holds true for the 1996 Constitution in the area of common law disputes between private persons who are not directly bound by the provisions entrenched in the Bill of Rights in terms of section 8(2). In such instances the Bill of Rights only applies indirectly to common law disputes. See Currie I & De Waal J *The Bill of Rights Handbook* (5th ed 2005) 73.

whether the decision in *Linvestment* amounts to a deprivation or expropriation that may be in conflict with section 25(1) and section 25(2) of the Constitution.

In the decision of *First National Bank of SA Ltd t/a Wesbank v Commisioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* (*FNB*),[20] the Constitutional Court set out the structure of the constitutional property analysis in the form of a set of questions as follows: The court has to determine whether the law or conduct complained of affects "property" as understood by section 25. If the law complained of affects "property" as understood by section 25, the court must determine whether there was a deprivation of property. If there was a deprivation of property, the court must determine whether the deprivation is consistent with the provisions of section 25(1) of the Constitution. If the deprivation is not consistent with the provisions of section 25(1) of the Constitution, the next step of the analysis is to determine whether the deprivation is justified under section 36 of the Constitution. If the deprivation was not in conflict with section 25(1) or may be justified under section 36 of the Constitution, the question is whether the deprivation amounts to expropriation for purposes of section 25(2). If the deprivation amounts to an expropriation, the next step is to determine whether the deprivation complies with the requirements of sections 25(2) and (3). If it does not comply with the requirements, the next question is whether the expropriation is justified under section 36.

This structure of analysis provided by *FNB* has been described as a "true algorithm".[21] The next part of the chapter follows the formal structure of the constitutional property clause as set out by the court in the *FNB* case to test the effect of the *Linvestment* decision.

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[20] 2002 (4) SA 768 (CC) para 46.
[21] Roux T "Property" in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2009 original service December 2003) 46-1 – 46-35 at 46-4; Currie I & De Waal J *The Bill of Rights Handbook* (5th ed 2005) 536.

4.2.2 Does the law or conduct complained of affect "property" as understood by section 25?

Section 25(1) of the Bill of Rights states that no one may be deprived of property except in terms of law of general application. This provision also states that no law may permit the arbitrary deprivation of property.

In any constitutional property inquiry, it is important to determine whether the interest or property at stake qualifies for protection under sections 25(1) and 25(2) of the Constitution before analysing the meaning of what a deprivation of property constitutes.[22] If the law does not interfere with a property interest that qualifies as property for constitutional purposes, the protection afforded in section 25 will not be available.[23] In *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*,[24] the Constitutional Court had to decide whether the property clause of the Constitution complied with established international human rights standards. The court held that there is no universal formulation that describes property and also that the general term "property" in section 25 is of such a nature that it allows sufficient scope to include all rights and interests that have to be protected according to international standards.[25] In the decision of the *FNB* case,[26] the court did not provide a comprehensive definition of property for purposes of section 25 and stated that it would be practically impossible to do so. However, the *FNB* court outlined its approach to the meaning of property by referring to Van der Walt's argument,[27] namely that the courts should move away from a static, private law conceptualist view of property to a more dynamic public law view of property. It seems as if the court will most likely adopt a wide conception of property, which includes all kinds of rights (real and personal rights) with regard to all categories of property (movable and immovable corporeal property as well as

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[22] Roux T "Property" in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2009 original service December 2003) 46-1 – 46-35 at 46-10.
[23] Roux T "Property" in Woolman S, Roux T & Bischop M (eds) *Constitutional Law of South Africa* (2nd ed 2009 original service December 2003) 46-1 – 46-35 at 46-10.
[24] 1996 (4) SA 744 (CC) para 72.
[25] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) paras 70-75.
[26] *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51.
[27] *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 52.

immaterial property).[28] In the *FNB* case the Constitutional Court said that as far as the objects of property rights are concerned, land would definitely be regarded as property in terms of section 25 of the Constitution.[29] Additionally, section 25(4) of the Constitution states that "property" is not restricted to land. Therefore, it can be concluded that at least land is considered an object of property rights for purposes of section 25.[30]

In order for the hypothetical argument derived from the *Linvestment* decision (namely that the relocation of a servitude may amount to an arbitrary deprivation in terms of section 25 of the Constitution) to succeed, it must be proved that the limited real right that the dominant owner has in the property of the servient owner is an interest in property for purposes of section 25 of the Constitution.

A servitude originates from an agreement between the owner of the dominant tenement and the owner of the servient tenement.[31] The servitude comes into existence as a real right only when the servitude arising from the agreement between the contracting parties is registered, "either by means of a reservation in a deed of transfer in the circumstances envisaged in section 76 of the Deeds Registries Act[32] or by the registration of a notarial deed, accompanied by an appropriate endorsement against the title deeds of the dominant and servient tenements, respectively".[33] All registered servitudes are real rights because they burden ownership.[34] A servitude is a limited real right in the property of another person which grants the holder of such a right specific entitlements.[35] Servitudes grant

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[28] Roux T "Property" in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2009 original service December 2003) 46-1 – 46-35 at 46-13.

[29] *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51. See Van der Walt AJ *Constitutional Property Law* (2005) 81.

[30] See Van der Walt AJ *Constitutional Property Law* (2005) 81.

[31] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 332.

[32] 47 of 1937.

[33] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 332. See *Wiloughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 1 at 16; *Lorentz v Melle & Others* 1978 (3) SA 1044 (T) 1049; *Felix v Nortier* [1996] 3 All SA 143 (SE) at 150-151; *Bührmann v Nkosi* 2000 (1) SA 1145 (T) 1153.

[34] Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The Principles of The Law of Property in South Africa* (2010) 239.

[35] Van der Merwe CG *Sakereg* (2nd ed 1989) 458. The author quotes Puchta GF *Pandekten* edited by Rudorff AF (11th ed 1872) par 178; Arndts L *Lehrbuch des Pandekten* edited by Pfaff L and Hofmann F (14th ed 1889) par 175 and Dernburg H *Pandekten* (6th ed 1900) par 235; Voet 7 1 1; Van Leeuwen *RHR* 2 19 1. See *Dreyer v Letterstedt's Executors* (1865) 5 Searle 88 at 99; *Dreyer v Ireland* (1874) 4 Buch 193 at 199; *L*orentz v *Melle & Others* 1978 (3) SA 1044 (T) 1049. See Badenhorst PJ, Pienaar JM & Mostert H

powers of use and enjoyment to a person other than the owner and require the owner of the land to refrain from exercising one or more of his entitlements of ownership.[36] The owner of the servient estate is also obliged not to interfere with the owner of the dominant tenement's use authorised by the servitude.[37] The owner of the property is expected to tolerate and respect the right of the holder of the servitude to use and enjoy the entitlements granted.[38]

The court in *Linvestment* decided that a specified servitude of right of way can be changed unilaterally by the owner of the servient tenement. The implication of the *Linvestment* judgment is that the owner of the dominant estate is deprived of his servitutal entitlement to have a say in the matter as to whether a relocation of a specified servitude of right of way should be allowed. The purpose and effect of registration is defeated when an order which allows the unilateral relocation of a registered, specified servitude of right of way is granted.[39] It also complicates the meaning, interpretation and effect of the limited real right of the owner of the dominant estate.[40] Unilaterally relocating a registered right of way that is clearly defined in the title deed has the effect of depriving the dominant owner of an aspect of a limited real right that he held. The court *a quo* held that when the servient owner is allowed to tread over the proprietary rights of the dominant owner because he is the owner of the property, this will have the effect of eroding the limited real rights that the dominant owner holds in the property in question.[41] In *Ex Parte Optimal Property Solutions CC*[42] the court held that registered praedial servitutal rights are included within the concept of "property" under section 25(1) of the Constitution and that any removal or deletion of such rights is a deprivation of property.[43]

Silberberg and Schoeman's The Law of Property (5th ed 2006) 321; Van der Merwe CG "Servitudes and other real rights" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 591-629 at 592; Van der Merwe CG & De Waal MJ *The Law of Things and Servitudes* (1993) para 215.

[36] Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The Principles of The Law of Property in South Africa* (2010) 236.

[37] Van der Merwe CG & De Waal MJ*The Law of Things and Servitudes* (1993) para 219.

[38] Van der Merwe CG *Sakereg* (2nd ed 1989) 471-472. See Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 322-326 for a discussion of the prerequisites for the establishment of a praedial servitude.

[39] *Linvestment CC v Hammersley and Another* [2007] 3 All SA 618 (N) para 41.

[40] *Linvestment CC v Hammersley and Another* [2007] 3 All SA 618 (N) para 41.

[41] *Linvestment CC v Hammersley and Another* [2007] 3 All SA 618 (N) para 43.

[42] 2003 (2) SA 136 (C) para 19.

[43] 2003 (2) SA 136 (C) para 19.

It is important to note that the unilateral relocation of the servitude does not completely and permanently deprive the servitude holder of his entitlement,[44] because it is required that the servient owner should provide the dominant owner with an alternative route that is equally useful. On the other hand, it can be argued that the owner of the dominant tenement did have a right to the fixed route and that this right is taken away by allowing the relocation of the fixed route to an alternative route. The alternative route does not provide the dominant owner with the same right he was initially entitled to.

Therefore, in the *Linvestment* case, the dominant owner had a limited real right in the property of the servient landowner. The limited real right of the dominant owner qualifies as property in terms of section 25 of the Constitution. The right of the dominant owner to the specified and registered route is an aspect or part of this right and should be regarded as property for purposes of section 25(1). If the court decides that the particular right or interest at stake amounts to property worthy of constitutional protection under section 25, the next stage of the analysis is to determine whether there was a deprivation of property.[45]

4.2.3 Was there a deprivation of the property by the law or conduct?

No comprehensive definition of "deprivation" has been adopted in South African case law yet.[46] The term "deprivation" is generally defined with reference to the way in which it differs from expropriation.[47] Both deprivation and expropriation involve state intervention with private property.[48] However, they differ from each other in the following way: When expropriation is involved, the state compulsorily acquires private property and compensates the affected owner.[49] On the other hand, when deprivation is involved, the state merely regulates the use of that property without acquiring it and the affected owner

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[44] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 68.
[45] Roux T "Property" in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2009 original service December 2003) 46-1 – 46-35 at 46-17.
[46] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 544.
[47] Van der Walt AJ *Constitutional Property Law* (2005) 123.
[48] Van der Walt AJ *Constitutional Property Law* (2005) 124.
[49] Van der Walt AJ *Constitutional Property Law* (2005) 124.

is not compensated.[50] When the owner of private property is deprived of his property, he will not be compensated because the regulatory deprivation is not intended to take property away.[51]

In *FNB*,[52] the Constitutional Court described the term "deprivation" as any interference with the use, enjoyment or exploitation of private property. The court held that a deprivation could entail the dispossession of "all rights, use and benefit to and of corporeal movable goods" and the court also stated that "deprivation" could also entail an infringement upon some of the ownership entitlements.[53]

In *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others*,[54] the Constitutional Court stated that whether a deprivation occurred "depend[s] on the extent of the interference or limitation of use, enjoyment or exploitation" and that "at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation".[55] According to Van der Walt,[56] this definition of deprivation is problematic in several aspects. Van der Walt states that it is odd that deprivation should be limited to that which exceeds restrictions that are normal, because all legitimate regulatory restrictions on the use and enjoyment of property are normal.[57] Van der Walt also submits that restricting the concept of deprivation to substantial or abnormal limitation on property use serves no purpose at all, because the purpose of section 25(1) is to legitimise the imposition of regulatory

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[50] Van der Walt AJ *Constitutional Property Law* (2005) 124.
[51] Van der Walt AJ *Constitutional Property Law* (2005) 124.
[52] *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 57, 61.
[53] *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 61.
[54] 2005 (1) SA 530 (CC).
[55] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) para 32.
[56] Van der Walt AJ *Constitutional Property Law* (2005) 127.
[57] Van der Walt AJ *Constitutional Property Law* (2005) 127.

control of property and the deprivation of property generally accompanies it.[58] According to Van der Walt, comparative analysis reveals that there are factors which can be taken into consideration when developing a useful definition for deprivation.[59]

If one applies the abovementioned legal principles defining a deprivation, it can be argued that a deprivation occurred in *Linvestment* when the court authorised the unilateral relocation of a specified servitude of right of way by a servient owner. Relocating a right of way that is registered and clearly defined in the title deed has the effect of depriving the dominant owner of a right that he held. In the court *a quo* of *Linvestment*, the court held that "the effecting of the alterations to the subject of the servitude by the owner of the servient tenement without the concurrence of the owner of the dominant tenement, invades the proprietary rights of the owner of the dominant tenement as contained in section 25(1) of the Constitution".[60] Furthermore, the court *a quo* held that when the servient owner is allowed to tread over the proprietary rights of the dominant owner because he is the owner of the servient property, this has the effect of eroding the limited real rights that the dominant owner holds in the property in question.[61] In *Ex Parte Optimal Property Solutions CC*[62] the court held that property rights are one of the fundamental rights enshrined in the Bill of Rights of the Constitution and that a purposive interpretation of "property" means that it should be read to include any right to, or any right in property.[63] Therefore, the court stated that registered praedial servitutal rights are included within the concept of "property" under section 25(1) of the Constitution and that any removal or deletion of such rights constituted a deprivation of property.[64]

Even though the abovementioned argument is convincing, it is important to note that unilateral relocation of the servitude by the servient owner does not completely and

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[58] Van der Walt AJ *Constitutional Property Law* (2005) 127: "In the constitutional framework of section 25(1) any regulatory restriction on the use and enjoyment of property, however small or significant can be classified as a deprivation."
[59] Factors that can be taken into consideration are *inter alia* the source of the power responsible for the deprivation, the purpose or intention behind the limitation, the effect of the limitation on the property holder. See Van der Walt AJ *Constitutional Property Law* (2005) 128-132.
[60] *Linvestment CC v Hammersley and Another* [2007] 3 All SA 618 (N) para 42.
[61] *Linvestment CC v Hammersley and Another* [2007] 3 All SA 618 (N) para 43.
[62] 2003 (2) SA 136 (C) para 19.
[63] 2003 (2) SA 136 (C) para 19.
[64] 2003 (2) SA 136 (C) para 19.

permanently deprive the servitude holder of his entitlement as such,[65] because it is required of the servient owner to provide the dominant owner with an alternative route. Furthermore, the court in *Linvestment* held that an existing servitude of right of way may only be altered if the servient owner will be materially inconvenienced in the use of his property if the status *quo* is maintained, if the relocation will not prejudice the owner of the dominant tenement and if the servient owner pays all costs incurred in the relocation of the servitude.[66] Therefore, deciding that the unilateral relocation amounts to a deprivation of the dominant owner's property does not entail that he loses his right of way or even that he necessarily loses anything material at all. The mere fact that he is deprived of the right to have a say in the location of the servitude is enough to characterise the unilateral relocation as a deprivation of property. The extent of the loss suffered by the dominant owner is more relevant when considering the justification for the decision to allow a unilateral relocation.

Once it is accepted that the unilateral relocation constitutes a deprivation of property for purposes of section 25(1), the next question is whether the deprivation complies with the requirements in section 25. Generally, case law tends to focus on the formal requirements for deprivation rather than attempting to define the concept of deprivation.[67] The next section will discuss the formal requirements that should be complied with, in order to determine whether a deprivation is justifiable in terms of the Constitution or not.

4.2.4 If there has been a deprivation of the property, is the deprivation consistent with the provisions of section 25(1)?

If the deprivation does not comply with the requirements as outlined in section 25(1), the limitation will be regarded as invalid, despite the merits of the purpose served.[68] The decision in *FNB* should always be the point of departure when analysing the

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[65] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 68.
[66] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 35.
[67] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 545.
[68] Van der Walt AJ *Constitutional Property Law* (2005) 137.

constitutionality of infringements of property in terms of section 25(1).[69] According to section 25(1), a deprivation must first of all be authorised by law of general application and secondly no law may allow arbitrary deprivation.

Additionally, it is required implicitly that the deprivation should serve a legitimate public purpose or be in the public interest.[70] According to Van der Walt,[71] it can be inferred from either the legality requirement or the non-arbitrariness requirement that section 25(1) contains an implicit public purpose requirement, even though section 25(1) does not state it explicitly. Van der Walt[72] relies on various comparative sources to illustrate his point of view, namely German law, US law, Irish law and the European Convention. It appears that foreign law is inclined to require that a regulatory deprivation of property should be in accordance with law, proportional and that it should be imposed for a public purpose or in the public interest. According to Van der Walt,[73] the recognition of the implicit requirement that a deprivation should be for a public purpose fits in with section 25(1) of the South African Constitution in view of what the Constitutional Court stated in *FNB*, namely that the prohibition of deprivation of property is imposed with due regard for proportionality between the public interest served by regulation and the private interests affected by it. Van der Walt[74] states that it is clear that section 25(1) recognises the power to impose regulatory limitations on the use and enjoyment of property, irrespective of the fact that it causes a deprivation of private property, because such regulatory action protects and promotes public health and safety interests. It is for this reason that it can be accepted that section 25(1) of the Constitution includes an implicit requirement that a deprivation of property should serve a public purpose or a public interest.

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[69] *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 60; Van der Walt AJ *Constitutional Property Law* (2005) 137; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 545.
[70] Van der Walt AJ *Constitutional Property Law* (2005) 137.
[71] Van der Walt AJ *Constitutional Property Law* (2005) 137.
[72] See the comparative law discussion in Van der Walt AJ *Constitutional Property Law* (2005) 137-139.
[73] *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100; Van der Walt AJ *Constitutional Property Law* (2005) 140.
[74] Van der Walt AJ *Constitutional Property Law* (2005) 140.

The first requirement is that only law of general application may limit property rights.[75] Section 25(1) refers to "law of general application" as opposed to "a law" in order to ensure that the regulatory deprivation of property may also be authorised by the rules of common and customary law.[76] The requirement that any deprivation of property must occur in terms of "law of general application" means that the law authorising the deprivation of property must be equally applicable to everybody involved.[77] A law will not comply with this requirement if the law is intended to single out a particular individual or group of individuals for discriminatory treatment.[78]

It is clear that the recently developed common law rule, namely that the owner of the servient estate is entitled to relocate a servitude unilaterally, is law of general application because it establishes or elucidates a common law rule that applies to all owners of servient and dominant estates.[79] The rule aims to strike a balance between the competing interests and rights of both parties. The rule aims to increase overall utility because the new rule only allows for the relocation of a servitude when the value of the servient estate will increase and the value of the dominant estate does not decrease.[80] Law of general application includes the common law. Therefore, the recently developed common law rule in *Linvestment* can be regarded as law of general application.

The second requirement is that even law of general application may not permit the arbitrary deprivation of property. There are two points of view regarding the meaning of the "non-arbitrariness" provision. One view is that the non-arbitrariness provision ensures formal procedural justice, read as a "thin", low level of scrutiny rationality test which ensures that the deprivation is rationally connected to some legitimate government

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[75] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 545.
[76] Van der Walt AJ *Constitutional Property Law* (2005) 144; *Thebus and Another v S* 2003 (10) BCLR 1100 (CC) para 31.
[77] Van der Walt AJ *Constitutional Property Law* (2005) 144; Roux T "Property" in Woolman S , Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2009 original service December 2003) 46-1 – 46-35 at 46-21.
[78] *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 (1) BCLR 23 (T) 29.
[79] *Thebus and Another v S* 2003 (10) BCLR 1100 (CC) para 65.
[80] Anonomous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1695.

purpose.[81] On the other hand, the interpretation of the non-arbitrariness requirement as a "thick", proportionality test means that a deprivation must establish sufficient reason for the deprivation.[82] This means that the deprivation should not only be rationally linked to a legitimate government purpose, but that it should also be justified in the sense of establishing a proper balance between means and ends.[83]

Prior to the decision in *FNB*[84] it was unclear whether the courts would follow a rationality or proportionality interpretation of the arbitrariness requirement.[85] In the *FNB* judgment, the court responded to the debate by deciding that the test involved will vary between mere rationality and a proportionality approach, depending on the context of each case.[86] The way in which the Constitutional Court in *FNB* analysed the constitutionality of legislation illustrates the court's application of the non-arbitrariness test. In the *FNB* case, the court adopted a substantive interpretation of the non-arbitrariness requirement.[87] The Constitutional Court held that a deprivation of property will be arbitrary and in conflict with section 25(1) of the Constitution if the law of general application in terms of which the deprivation is effected or authorised does not provide sufficient reasons for the deprivation and if the deprivation is procedurally unfair.[88] In order to determine whether there is sufficient reason for the deprivation, the courts will have to consider a complexity of relations.[89] These relations include the "relationship between the means employed and the ends sought to be achieved, the relationship between the purpose for the deprivation and

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[81] Van der Walt AJ *Constitutional Property Law* (2005) 145.
[82] *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 105, 115.
[83] Van der Walt AJ *Constitutional Property Law* (2005) 145.
[84] *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 65.
[85] Van der Walt AJ *Constitutional Property Law* (2005) 146.
[86] *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 66.
[87] *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).
[88] *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.
[89] Van der Walt AJ *Constitutional Property Law* (2005) 153.

the person whose property is affected, and the relationship between the purpose of the deprivation and the nature of the property and the extent of the deprivation".[90]

In *Mkontwana*[91] the Constitutional Court was confronted with a constitutional property law challenge regarding the constitutional validity of section 118(1) of the Local Government Municipal Systems Act 32 of 2000. This section had the effect of placing limits on the owner's power to transfer immovable property. Section 118(1) stated that the registrar of deeds may not authorise the transfer of any property without a certificate issued by the municipality after the unpaid consumption charges during the previous two years have been settled in full.[92] The provision was used to collect debts incurred by non-owner occupiers (tenants, illegal occupiers).[93] The High Court held that the legislation created an arbitrary deprivation of property, because of the absence of a relevant *nexus* between the debts on the one hand and the owner on the other hand.[94] The court held that insufficient reason existed for this provision to deprive owners of the right to transfer their properties, especially in cases where the owners are technically not responsible for the municipal debts incurred in respect of their properties.[95] The High Court's finding was referred to the Constitutional Court. The Constitutional Court had to determine whether there was a sufficient reason for the deprivation. In order to answer this legal question, the court had to take into consideration the relationship between the purpose of the legislation and the deprivation effected by that law.[96] The court applied the test for arbitrary deprivation as set out in *FNB* and came to the conclusion that there was a sufficient reason for the deprivation.[97] It was stated in *Mkontwana* that there was a close connection between the

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[90] *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100; Van der Walt AJ *Constitutional Property Law* (2005) 153.
[91] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC).
[92] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) para 2.
[93] Currie I & De Waal J *The Bill of Rights Handbook* (5th ed 2005) 548.
[94] *Mkontwana v Nelson Mandela Metropolitan Municipality* case no 1238/02 (SECLD) para 57.
[95] *Mkontwana v Nelson Mandela Metropolitan Municipality* case no 1238/02 (SECLD).
[96] Van der Walt AJ *Constitutional Property Law* (2005) 156.
[97] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) paras 34-35.

purpose of the deprivation of property (the collection of municipal debts incurred in respect of the supply of services to a particular property) and ownership of the property (the owner was made indirectly responsible for debts incurred in supplying services to his property), even when the land was unlawfully occupied and the charges were levied for services enjoyed by the unlawful occupiers.[98] The court held that it was not arbitrary to impose indirect liability on a property owner for debts incurred by occupiers, essentially because the property owner benefited from the supply of the services to the property.[99] Furthermore, it was stated that it could be expected from the owner to take steps to prevent illegal occupation of the premises, to choose a responsible tenant and to monitor payment by the tenant of consumption charges that are due.[100]

In *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another*,[101] the Gauteng Transport Infrastructure Act 8 of 2001 had the effect of placing restrictions on the use, enjoyment and exploitation of privately owned property. Sections 10(1) and (3) of the Act authorised provincial authorities "to subject route determinations and preliminary designs of provincial roads which had been approved under the previous regulatory scheme, to the regulatory measures under the Act".[102] The applicants, who were landowners whose properties were affected by the road network in the Gauteng Province, applied to the High Court for an order declaring sections 10(1) and 10(3) of the Gauteng Transport Infrastructure Act 8 of 2001 to be unconstitutional and invalid. The legal question in this case was whether this legislation amounts to an arbitrary deprivation of property or alternatively, whether the deprivation amounted to an expropriation of property without just and equitable compensation. They based their application on the grounds that the Act arbitrarily deprived

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[98] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) paras 39-40, 53-54; Currie I & De Waal J *The Bill of Rights Handbook* (5th ed 2005) 549.

[99] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) para 53; Currie I & De Waal J *The Bill of Rights Handbook* (5th ed 2005) 550.

[100] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) para 53.

[101] 2009 (6) SA 391 (CC).

[102] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and another* 2009 (6) SA 391 (CC).

them of their land and that it was in violation of section 25(1) of the Constitution, that the deprivation amounted to an expropriation without just and equitable compensation and that the Act failed to facilitate co-operative governance.

The High Court declared section 10(3) of the Act unconstitutional and invalid.[103] However, the High Court did not declare section 10(1) unconstitutional and invalid because the restrictions imposed by the provision were not extreme.[104] The applicants appealed to the Constitutional Court for confirmation of the High Court's declaration that section 10(3) of the Act is unconstitutional. The applicants also appealed against the High Court's decision not to declare section 10(1) of the Act unconstitutional. The Constitutional Court held that the deprivation was not sufficient to be regarded as being inconsistent with section 25(1) of the Constitution.[105] The interference is only regarded as unconstitutional if the deprivation is arbitrary.[106] The applicants have to prove that the law in question provided insufficient reason for the deprivation or that the provision was procedurally unfair.[107] The court relied on the *FNB* decision and held that the substantive arbitrariness in this case required more than the presence of a rational connection between the means adopted and the ends sought to be achieved in order for the deprivation not to be arbitrary.[108] The *Reflect-All* case dealt with land on which section 10(3) imposed far-reaching restrictions. Therefore, compelling reasons had to be provided in order for the restrictions not to be arbitrary.[109] Nkabinde J held that section 10(3) of the Act was not unreasonably disproportionate to the end sought to be achieved because the Act struck a balance between the legitimate interests in protecting the hypothetical road network while at the same time ensuring that

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[103] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and another* 2009 (6) SA 391 (CC) para 8.
[104] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and another* 2009 (6) SA 391 (CC) para 8.
[105] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and another* 2009 (6) SA 391 (CC) paras 44-60.
[106] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and another* 2009 (6) SA 391 (CC) paras 38-39.
[107] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and another* 2009 (6) SA 391 (CC) paras 38-39.
[108] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and another* 2009 (6) SA 391 (CC) para 52.
[109] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and another* 2009 (6) SA 391 (CC) para 52.

individual property rights were protected.[110] Therefore, it cannot be regarded as arbitrary.[111]

When applying the test for arbitrary deprivation to *Linvestment*, the question is whether the result of the *Linvestment* judgment, namely that a specified servitude of right of way can be relocated unilaterally, constitutes an arbitrary deprivation of property of the dominant estate owner, which may be in conflict with section 25(1) of the Constitution.[112]

This part of the chapter will analyse the procedural fairness of the outcome in *Linvestment*. If the deprivation is procedurally unfair, it will be regarded as arbitrary.[113] Procedural fairness is a flexible concept because the requirements that has to be complied with in order to make an action procedurally fair will depend on the circumstances.[114] The question that has to be addressed with regard to the facts in *Linvestment* is whether the outcome of the decision is procedurally unfair. The court in *Linvestment* did not stipulate whether obtaining judicial consent was a prerequisite before a unilateral relocation of a specified servitude of right of way can take place. On the one hand, it may be argued that the outcome of the *Linvestment* case is not procedurally unfair because the court mentioned strict requirements that have to be complied with before a servient owner may unilaterally relocate a servitude of right of way. In other words, even if the flexible legal approach allows the burdened landowner to determine the utility of the servitude holder's right in the existing location, the owner of the dominant tenement may always approach the court and demand restoration of the servitude to its original location if there is any doubt pertaining to the reasonableness of the relocation of the servitude.[115] If the fairness criteria are not met by the servient owner, it is most likely that a court will order that the servitude should be located to its original position. The mere fact that the servient owner

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[110] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and another* 2009 (6) SA 391 (CC) para 58.
[111] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and another* 2009 (6) SA 391 (CC) para 60.
[112] 2002 (4) SA 768 (CC).
[113] *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 67, 100. See Currie & De Waal *The Bill of Rights Handbo*ok (5th ed 2005) 543.
[114] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) para 65. See Currie & De Waal *The Bill of Rights Handbo*ok (5th ed 2005) 543.
[115] See Chapter 3 section 3.2.

runs the risk that the unilateral relocation would be negated if he does not comply with the criteria of the flexible legal approach serves as a deterrent to prevent abusive unilateral relocations.[116]

On the other hand, the absence of a declaratory order authorising the relocation of a servitude of right of way may be procedurally unfair to a certain extent.[117] Assigning the entitlement to relocate the servitude unilaterally to the owner of the servient tenement without the consent of the owner of the dominant tenement would lead to an increase in the costs of beginning the bargaining process because the owner of the servient tenement may have already invested significant resources in relocating the servitude.[118] The owner of the dominant tenement would incur information costs when he discovers the plans of the owner of the servient tenement to relocate the servitude.[119] It is also likely that the owner of the servient tenement would incur preparation costs before making any visible improvements.[120] When the owner of the dominant tenement eventually becomes aware of the intention of the owner of the servient to relocate the servitude and initiates bargaining, the owner of the servient tenement may be reluctant to accept an offer from the owner of the dominant tenement to cease the relocation.[121] Even though the owner of the servient tenement may be under the impression that he complied with the fairness criteria, it is possible that the alternative route selected by the owner of the servient tenement may still be inconvenient for the owner of the dominant tenement. In Louisiana, some courts have focused on the necessity of requiring judicial authorisation before relocation of servitudes can take place.[122] In Colorado, the Supreme Court[123] was emphatic that the servient

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[116] *Brian v Bowlus* 399 So 2d 545 (La 1981) at 549. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 57-58. See Chapter 5 section 5.4.3.

[117] See Chapter 5 section 5.4.

[118] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1700-1701.

[119] Anonomous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1701.

[120] Anonomous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1700.

[121] Anonomous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1701.

[122] *Hotard v Perrilloux* 8 La App 476 (1928) WL 3837 (La App Orleans); *Denegre v Louisiana Public Service Commission* 257 La 503, 242 So 2d 832 (La 1979) 838; *Discon v Sara Inc* 265 So 2d 765 (La 1972); *Brian v Bowlus* 399 So 2d 545 (La 1981). See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 56-58. See Chapter 5 section 5.4.3.

owner should obtain a declaratory order from court before initiating alterations. The court stated that in order to avoid an adverse ruling of trespass or restoration of the servitude, the court is the appropriate forum for the resolution of a dispute pertaining to the relocation of servitudes.[124] The Supreme Judicial Court[125] in Massachusetts reiterated this point and stated that the owner of the servient tenement should obtain a declaratory order from court that the relocation meets the fairness criteria and that the servient owner should not resort to self-help remedies. In the Louisiana case of *Brian v Bowlus*,[126] the court was divided on the question whether the owner of the servient tenement could relocate a servitude unilaterally without obtaining judicial authorisation for the relocation.[127] The majority were unperturbed by the procedural sequence of the flexible legal approach.[128] The majority noted that the mere fact that the owner of the servient tenement runs the risk that the unilateral relocation investment would be wiped out if the owner of the servient tenement does not comply with the criteria of the flexible legal approach serves as a deterrent to prevent abusive unilateral relocations.[129] Justice Lemmon dissented on this point.[130] He stated that the owner of the servient tenement should first obtain consent from the owner of the dominant tenement or that he should "have the relocation approved and the new location fixed by the court".[131] Justice Lemmon noted that the servient owner's failure to obtain judicial approval meant that even if the relocation were later approved, the servient owner should still be penalised for the servitude holder's loss of use of the original servitude during the interval between unilateral relocation and the eventual judicial

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[123] *Roaring Fork Club LP v St Jude's Co* 36 P 3d 1229 (Colo 2001) 1237-1238. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 58.

[124] *Roaring Fork Club LP v St Jude's Co* 36 P 3d 1229 (Colo 2001) 1237-1238. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 58.

[125] *MPM Builders LLC v Dwyer* 442 Mass 87, 809 N E 2d 1053 (2004) 1059. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 58.

[126] 399 So 2d 545 (La 1981) 549-550.

[127] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 357.

[128] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 58.

[129] *Brian v Bowlus* 399 So 2d 545 (La 1981) 549. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 57-58. See also Chapter 5 section 5.4.3.

[130] *Brian v Bowlus* 399 So 2d 545 (La 1981) 550 (Justice Lemmon concurs in part and dissents on part of the majority decision). See Chapter 5 section 5.4.3.

[131] *Brian v Bowlus* 399 So 2d 545 (La 1981) 550.

approval.[132] Even though the majority's decision is convincing, the arguments raised by Justice Lemmon are also noteworthy.[133] According to Cuisine and Paisley, an accurate statement of the Scots law regarding the obtaining of judicial consent prior to the relocation of a servitude is that judicial consent will only be required for alterations to the route of a servitude which are "material and extensive in nature".[134] In situations where a unilateral relocation is competent and if the alternative route proposed is not "material and extensive in nature", none of the Scots law authorities requires a court order to be obtained before relocation may be effected.[135] If one takes into consideration the latter arguments, it appears as though the absence of a declaratory order authorising the relocation of a servitude of right of way may be procedurally unfair. In situations where the proposed route is material and extensive in nature, the servient owner should only be allowed to relocate the servitude once the court has granted a declaratory order authorising the servient owner to do so. The court is a neutral decision maker and will be able to determine if "the utility of the easement owner's right in the existing location" is outweighed by the benefit and utility of the servient owner's proposed relocation.[136]

In addition to procedural considerations, the requirement that a deprivation should not be of an arbitrary nature imposed a second constraint on a law that effects a deprivation of property.[137] This requirement insists that a law that deprives someone of property is non-arbitrary in its substance.[138] The Constitutional Court held that arbitrariness in substance is assessed by means of a test that falls between a "mere rationality" enquiry and the proportionality enquiry that is used to assess the legitimacy of a limitation of rights.[139]

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[132] *Brian v Bowlus* 399 So 2d 545 (La 1981) 550.
[133] See Chapter 5 section 5.4.3.
[134] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.63. See *Bain v Smith & Morrison* (1871) 8 SLR 539 at 540.
[135] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.63.
[136] See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 59; Orth JV "Relocating easements: A response to Professor French" (2004) 38 *Real Prop Prob & Tr J* 643-654 at 650.
[137] Currie & De Waal *The Bill of Rights Handbook* (5th ed 2005) 545.
[138] Currie & De Waal *The Bill of Rights Handbook* (5th ed 2005) 545.
[139] *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 65.

In the next section, the interplay of factors as mentioned in *FNB*[140] will be assessed in order to determine whether there are sufficient reasons for the deprivation of the dominant owner's limited real right in *Linvestment*. In the first instance, the end sought to be achieved in the Supreme Court of Appeal in *Linvestment* was to allow the servient owner to develop his land. The means employed to achieve this result was to develop the traditional common law rule (prohibiting the relocation of a servitude without obtaining mutual consent) pertaining to the relocation of a specified servitude of right of way to a more flexible legal approach (authorising the unilateral relocation of a specified servitude of right of way if certain requirements are complied with). Secondly, the purpose of the deprivation was to allow the servient owner to develop the land on which the servitude was located. The person whose property is affected as a result of the deprivation is the dominant owner who has a registered limited real right in the servient tenement. Even though the dominant owner does not lose his entitlement completely, he loses the right to use the road that he has initially agreed upon. Finally, the property in question is the limited real right that the dominant owner has over the property belonging to the servient tenement; and specifically the dominant owner's right to be involved in a decision to relocate the specified and registered servitude. Even though the dominant owner holds a limited real right and not ownership in the affected property, a more compelling purpose will have to be established in order for the common law as it has been developed in the Supreme Court of Appeal decision of *Linvestment* to constitute a sufficient reason for the deprivation. If it is argued that the deprivation in *Linvestment* is marginal, the deprivation will not be arbitrary if the deprivation is rationally connected to the legitimate purpose.[141] However, if it is argued that the deprivation is severe, then it will have to be shown that the deprivation is proportionate.[142]

In *Linvestment*,[143] the purpose of the new rule is to allow one of the contracting parties (the owner of the servient estate) to deviate from the initial servitutal agreement unilaterally and

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[140] *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.
[141] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 49.
[142] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and another* 2009 (6) SA 391 (CC) para 49.
[143] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 31.

against the other party's will, especially if upholding the initial agreement will benefit neither party and if it will have the effect of prejudicing one of the parties. It appears as though the outcome of this rule is to strike a balance between the landowner's right to use and enjoy the servient property and the servitude holder's right of ingress and egress.[144] The policy grounds that the court based its decision on, namely fairness and justice are convincing to a certain extent, since the law cannot remain rigid and needs to change in order to meet changing conditions. It does not appear as though the new rule interferes with the right of the owner of the dominant estate too severely, because the court held that an existing servitude of right of way may only be altered if the servient owner will be materially inconvenienced in the use of his property if the status *quo* is maintained, if the relocation will not prejudice the owner of the dominant tenement and if the servient owner pays all costs incurred in the relocation of the servitude.[145] If one takes into consideration the abovementioned factors, the deprivation by definition has to be described as immaterial. In terms of the *FNB* constitutional property analysis, justification of the deprivation therefore requires mere rationality.[146]

In view of the abovementioned opinions, it appears as though the unilateral relocation of a specified servitude of right of way in *Linvestment* may be arbitrary unless the relocation is effected by a court order. Even though the policy reasons provided for the limitation are sufficient to justify the marginal substantive effects of the deprivation, the deprivation in *Linvestment* may be arbitrary because it may be regarded as procedurally unfair in the absence of a court order. If it should be argued that the deprivation in *Linvestment* is arbitrary, the next step of the constitutional test as set out in the *FNB* case would be to determine whether the deprivation is justifiable in terms of section 36 of the Constitution.

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[144] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 6.
[145] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 35.
[146] Van der Walt AJ *Constitutional Property Law* (2005) 145.

4.2.5 If the deprivation is not consistent with the provisions of section 25(1), is the deprivation justified under section 36 of the Constitution?

If the deprivation is not consistent with the provisions of section 25(1) because it might be procedurally unfair or substantively arbitrary, the next step of the analysis is to determine whether the deprivation is justified under section 36 of the Constitution.[147] The respondent will have to prove that the provision or conduct complies with the criteria set out in section 36. This entails showing that the right has been limited by law of general application; and that the specific law can be considered "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom"; taking into account all relevant factors.[148] These relevant factors include the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means available to achieve the purpose.

In *Linvestment*, the nature of the dominant owner's right is a limited real right. The dominant owner is deprived of his servitutal entitlement to have a say in the matter as to whether a relocation of a specified servitude of right of way should be allowed. The purpose of the infringement is to accommodate the servient owner to develop his land. The nature and extent of the infringement is not too severe, because the court provides certain requirements that the servient owner should comply with before he will be authorised to relocate the servitude.[149] A deprivation will be justified in terms of section 36 if there is no less restrictive means available to achieve the purpose of the recently developed common law rule. Requiring a court order before relocation can take place would be a less restrictive way of achieving the same purpose. Therefore, it can be argued that the deprivation would not be justifiable under section 36 of the Constitution in the absence of the requirement that there should be a court order before relocation can take place. If one assumes that the deprivation was not arbitrary if it was authorised by a court order, the next step is to determine whether the deprivation amounts to an expropriation.

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[147] *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.
[148] Currie I & De Waal J *The Bill of Rights Handbook* (5th ed 2005) 561.
[149] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 35.

4.3 The expropriation provision: Section 25 (2)

4.3.1 Introduction

A deprivation of property is regarded as an interference with property, while expropriation is defined as a subset of deprivation.[150] The distinction between the two terms has practical significance and is not merely terminological and conceptual due to the requirement that expropriations must be compensated.[151] The requirement of compensation does not attach to an ordinary deprivation.[152] Accordingly, it is very important to distinguish between deprivations of property that do not amount to expropriation and those that do.[153] However, the distinction between the two categories is not as simple as it may appear.[154] There may be cases where it would be difficult to decide whether a state interference amounts to a deprivation or to an expropriation.[155]

It is important to note that the structure of analysis of sections 25(1) and 25(2) as set out in *FNB*[156] treats expropriation as a subset of the wider category of deprivations of property.[157] The *FNB* case states that all expropriations are deprivations, while only some deprivations will be regarded as expropriations.[158] It is clear that the deprivation in *Linvestment* did not amount to an arbitrary deprivation, because the court provided sufficient reasons for the marginal deprivation of the dominant owner's limited real right brought about by a unilateral relocation of a specified right of way as described in the decision. Provided that the relocation is authorised by a court order, the deprivation would not be arbitrary. In that case, the deprivation in *Linvestment* complies with section 25(1) of the Constitution. Therefore, the next step is to assess whether the deprivation in *Linvestment* also amounts to an expropriation.

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[150] *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 57-58.
[151] Currie I & De Waal J *The Bill of Rights Handbook* (5th ed 2005) 551.
[152] Van der Walt AJ *Constitutional Property Law* (2005) 124.
[153] Currie I & De Waal J *The Bill of Rights Handbook* (5th ed 2005) 551.
[154] Van der Walt AJ *Constitutional Property Law* (2005) 181.
[155] See Chapter 4 section 4.2.3.
[156] *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.
[157] Currie I & De Waal J *The Bill of Rights Handbook* (5th ed 2005) 536.
[158] *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 57-58. See Van der Walt AJ *Constitutional Property Law* (2005) 15, 181-192.

4.3.2 Does the deprivation amount to expropriation for purposes of section 25(2) of the Constitution?

Section 25(2) of the Constitution provides that property may only be expropriated in terms of law of general application, for a public purpose or in the public interest. It also states that expropriation is subject to payment of compensation that is just and equitable. The amount of compensation to be paid will depend on the agreement reached between the parties who are affected by the expropriation or it may be decided by a court, but it has to reflect an equitable balance between the public interest and the interests of those affected by expropriation.[159] When calculating the amount of compensation, all relevant circumstances must be taken into consideration, including the list of circumstances enumerated in section 25(3)(a)-(e).

The main issue is whether a deprivation such as that established in *Linvestment* can or should be regarded as an expropriation. In *Harksen v Lane NO*[160] (*Harksen*) and *Steinberg v South Peninsula Municipality*[161] (*Steinberg*) the courts provided guidelines to distinguish between expropriation and other forms of deprivation of property.[162] In *Harksen* the Constitutional Court held that the property of the appellant had not been expropriated, even though the legal effect of the provision was to pass full ownership of the solvent spouse's property to the trustee of the insolvent estate.[163] The Constitutional Court stated that expropriation for purposes of section 28(3) of the interim Constitution means the acquisition of rights in property by a public authority against the payment of compensation.[164] The court concluded that an expropriation is more than a mere dispossession because it requires the expropriator to appropriate or acquire or become owner of the property.[165] Goldstone J held that there was no basis for regarding the effect

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[159] Van der Walt AJ *Constitutional Property Law* (2005) 272.
[160] 1998 (1) SA 300 (CC).
[161] 2001 (4) SA 1243 (SCA).
[162] Roux T "Property" in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2009 original service December 2003) 46-1 – 46-35 at 46-30.
[163] *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 35.
[164] *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 32. For a discussion of the case see Van der Walt AJ *Constitutional Property Clause* (2005) 184-185 and Currie I & De Waal J *The Bill of Rights Handbook* (5th ed 2005) 552-553.
[165] Van der Walt AJ "Striving for the better interpretation: A critical reflection on the Constitutional Court's *Harksen* and *FNB* decisions on the property clause" (2004) 121 *SALJ* 854-878 at 862.

of section 21 as an expropriation, because the legislature did not intend that the public authority should acquire the property of the solvent spouse on a permanent basis.[166]

In *Steinberg v South Peninsula Municipality*[167] (*Steinberg*) Cloete AJA held that even though section 25 provides a clear distinction between deprivation and expropriation of property, there is room in South Africa for the development of a doctrine akin to constructive expropriation.[168] Nevertheless, Cloete AJA stated that the development of a more general doctrine of constructive expropriation may be undesirable both for the pragmatic reason that it could create uncertainty in the law and the theoretical reason that if compensation is paid to the owner for a right which is limited it will adversely affect the constitutional imperative of land reform embodied in section 25 of the Constitution.[169]

In *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another*[170] (*Reflect-All*), Nkabinde J held that section 10(3) of the relevant Act was not in conflict with section 25(2) of the Constitution because the particular provision did not transfer rights to the state. Nkabinde J accepted the distinction drawn between deprivation and expropriation in the *Harksen* case.[171] A result of the *Harksen* judgment was that the court asserted that the meaning of expropriation should not extend to situations where the deprivation does not have the effect that the property is acquired by the state.[172] The state did not acquire the applicants' land as envisaged in sections 25(2) and 25(3) of the Constitution. As a result, no compensation had to be paid.[173]

Van der Walt[174] states that it is unfortunate that the court relied on the *Harksen* case to indicate whether the court is dealing with an expropriation. According to the *Harksen*[175]

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[166] *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 37. See also Roux T "Property" in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2009 original service December 2003) 46-1 – 46-35 at 46-30.
[167] 2001 (4) SA 1243 (SCA).
[168] *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA) para 8.
[169] *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA) para 8.
[170] 2009 (6) SA 391 (CC) paras 64-65.
[171] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and another* 2009 (6) SA 391 (CC) paras 64-65.
[172] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and another* 2009 (6) SA 391 (CC) para 64.
[173] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and another* 2009 (6) SA 391 (CC) para 64-65.
[174] Van der Walt AJ *JQR Property* 2009 (3) 2.2.

case, an expropriation will exist only in the case where the state acquired the property or rights. Van der Walt[176] stated that the absence of state acquisition of property rights is not sufficient to conclude that there was no expropriation. According to Van der Walt, "a more convincing and simpler conclusion would have been the absence of an act of expropriation in terms of legislation that authorises expropriation".[177] If an expropriation is not authorised in terms of law, then it will be unnecessary to consider the irrelevant debate about constructive expropriation.[178] Additionally, he argues that the court's reliance on the *Steinberg* decision is also unfortunate.[179] The court in *Reflect-All* stated that because the state had not acquired the applicants' land as envisaged in sections 25(2) and 25(3) of the Constitution, no compensation had to be paid.[180] Van der Walt[181] emphasised that the court in *Reflect-All* could have decided that payment of compensation ought to be irrelevant because no formal expropriation was involved. Van der Walt[182] submits that an excessively burdensome deprivation of property should be regarded as a form of arbitrary deprivation. If the deprivation is arbitrary, then it should be regarded as unconstitutional instead of trying to force the discussion into a theoretical analysis of what constitutes an expropriation and what does not.[183]

The court in *FNB* treated expropriations as a subset of deprivation.[184] Even where the disputed law in question clearly provides for the expropriation of property, the law will have to be assessed for compliance with section 25(1).[185] The *FNB* court stated that section 25(1) will always be the point of departure when considering any challenge under section

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[175] *Harksen v Lane NO* 1998 (1) SA 300 (CC).
[176] Van der Walt AJ *JQR Property* 2009 (3) 2.2.
[177] Van der Walt AJ *JQR Property* 2009 (3) 2.2.
[178] Van der Walt AJ *JQR Property* 2009 (3) 2.2.
[179] Van der Walt AJ *JQR Property* 2009 (3) 2.2.
[180] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and another* 2009 (6) SA 391 (CC) para 64-65.
[181] Van der Walt AJ *JQR Property* 2009 (3) 2.2.
[182] Van der Walt AJ *JQR Property* 2009 (3) 2.2.
[183] Van der Walt AJ *JQR Property* 2009 (3) 2.2.
[184] *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57. See Roux T "Property" in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2009 original service December 2003) 46-1 – 46-35 at 46-29.
[185] *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 58-60. See Roux T "Property" in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2009 original service December 2003) 46-1 – 46-35 at 46-29.

25.[186] Expropriation is regarded as a subcategory of deprivation; and for this reason expropriation must comply with the general requirements for deprivation before it can even be tested against the requirements for expropriation.[187] The requirements for deprivation are also applicable to the expropriation of property, consequently law of general application and public purpose are both also required for an expropriation to be constitutionally valid.[188] In short, before the compliance of any arguably expropriatory act can be tested against the requirements in section 25(2), it has to comply with the requirements in section 25(1) first.

The *FNB* case illustrates that it is unlikely that a law that deprives the claimant of his property without providing for compensation, will survive the test for arbitrariness.[189] According to Roux,[190] this example illustrates that it does not matter whether the law is categorised as providing for a deprivation of property that does not amount to expropriation or whether it is categorised as a law that provides for the expropriation of property. In the same way, a law that provides for the compensated expropriation of property but which is not designed to serve a "public interest or public purpose" is unlikely to provide a sufficient reason for the deprivation of property in terms of section 25(1) of the Constitution.[191] Therefore, it is doubtful whether such a law will survive constitutional scrutiny beyond the section 25(1) stage.[192] Roux[193] notes that the only circumstances where a plaintiff may have an interest to persuade a court that a law provides for the expropriation of property instead of an arbitrary deprivation of property, is where the plaintiff requests that the law should be preserved and requests of the court to read in a requirement that the state should pay some form of compensation. Therefore, insofar as

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[186] *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 60.
[187] Van der Walt AJ *Constitutional Property Law* (2005) 137.
[188] Van der Walt AJ *Constitutional Property Law* (2005) 137.
[189] *Nhlabati and Others v Fick* 2003 (7) BCLR 806 (LCC) paras 27-31. See Roux T "Property" in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2009 original service December 2003) 46-1 – 46-35 at 46-29.
[190] Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2009 original service December 2003) 46-1 – 46-35 at 46-29.
[191] Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2009 original service December 2003) 46-1 – 46-35 at 46-29.
[192] Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2009 original service December 2003) 46-1 – 46-35 at 46-29.
[193] Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2009 original service December 2003) 46-1 – 46-35 at 46-29.

the *Linvestment* decision results in an arbitrary deprivation, it is unlikely that it would ever comply with the requirements for a valid expropriation in terms of section 25(2).

However, it should be noted that *Nhlabathi and Others v Fick*[194] (*Nhlabathi*) provides an illustration of the way in which consideration of all the circumstances could indicate that the expropriation of a right without the payment of compensation may be justified, in terms of both section 25(1) and section 25(2).[195] This case dealt with the constitutional validity of section 6(2)(*d*A) of the Extension of Security of Tenure Act 62 of 1997.[196] This provision granted the right to bury a deceased occupier including members of the occupier's family on agricultural land. This right was granted regardless of the landowner's reluctance to grant consent. The burial right must be in accordance with the occupiers' religion or cultural belief and an established practice in respect of such burials must exist on the land. The court held that the provision was not unconstitutional. The court acknowledged, without deciding, that the granting of a right to establish a grave could amount to an expropriation of land without compensation.[197] In *Nhlabathi* the court held that the occupier's right to appropriate a grave site on the owner's land without the owner receiving any compensation was reasonable and justifiable.[198] In *Nhlabathi*, the court provided various reasons in order to justify the uncompensated expropriation.[199] The court held that the right does not create a major interference with the property rights of the landowner; the right of the occupiers is subject to balancing with the rights of the landowner; the right will only exist where there is an established practice to bury deceased members residing on the land; and the occupiers had to comply with a cultural belief that deceased members of their family must be buried close to their homestead.[200] The court held that giving statutory recognition to that belief accords with the constitutional mandate of the state to institute land reform measures.[201] Hence, according to this decision, it is theoretically possible that a person's property could be expropriated without any compensation, in such a way and

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[194] 2003 (7) BCLR 806 (LCC).
[195] Van der Walt AJ *Constitutional Property Law* (2005) 280.
[196] See Van der Walt AJ *Constitutional Property Law* (2005) 280.
[197] *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC) paras 32-35. See Van der Walt AJ *Constitutional Property Law* (2005) 280.
[198] *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC) para 35.
[199] *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC) para 35.
[200] *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC) para 35.
[201] *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC) para 35.

under circumstances which renders such an expropriation justifiable in terms of section 25(2).

In conclusion, even though there is a possibility that the outcome of the *Linvestment* judgment may be in compliance with the requirements of section 25(1) of the Constitution, for instance if the deprivation is authorised by a court order, it does not seem as if this particular deprivation could amount to an expropriation. In *Linvestment*, the court stated that the owner of the servient estate will only be able to relocate the servitude of right of way if the specified route materially inconveniences the owner of the servient estate and if the relocation will not prejudice the owner of the dominant tenement.[202] The *Linvestment* judgment cannot be characterised as an expropriation, because the deprivation is not aimed at acquiring property forcibly for a public purpose.[203] The purpose of the rule is to make one party better off without making the other party worse off and to improve the use of private land.[204] According to Van der Walt,[205] Roux may be correct in stating that it is doubtful that common law rules will be invoked in expropriation cases, because in our legal system expropriation is a state action that will always be carried out in terms of statutory authorisation.

4.4 Conclusion

The aim of this chapter was to evaluate whether the result of the *Linvestment* judgment, namely that a servitude may be relocated unilaterally, constitutes an arbitrary deprivation of property rights for the dominant estate owner, which may be in conflict with section 25(1) of the Constitution. A second constitutional aspect of the decision in *Linvestment* is the question whether the decision, and with it the possibility that a specified servitude of right of way may be relocated unilaterally, could constitute an expropriation of property (particularly the rights of the owner of the dominant tenement) and, if so, whether such expropriation is in conflict with sections 25(2) and 25(3) of the Constitution.

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[202] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 35.
[203] Van der Walt AJ *Constitutional Property Law* (2005) 242-269.
[204] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1 – 15 at 5. See footnote 224 in Van der Walt AJ *Constitutional Property Law* (2005) 239.
[205] Van der Walt AJ *Constitutional Property Law* (2005) 239.

In order for the argument that the decision in *Linvestment* may amount to an arbitrary deprivation on the part of the owner of the dominant estate to succeed, it had to be justified that this private legal dispute was constitutionally relevant and that section 25 was applicable. The decision reached in *Linvestment*[206] can be regarded as a constitutional issue, because the common law rules that regulate the relocation of servitudes and their effect on private rights must comply with section 25 and have to be developed in terms of section 39(2) of the Constitution.

In order to determine whether the legal dispute in *Linvestment* constituted a deprivation in terms of section 25(1) or an expropriation in terms of section 25(2), the structure of analysis as set out in the *FNB* case was applied to *Linvestment*. First, it had to be determined whether the law or conduct complained of affected "property" as understood by section 25. All servitudes are real rights, since they burden ownership.[207] In the *Linvestment* case, the dominant owner had a limited real right in the property of the servient landowner. A servitude is a limited real right in the property of another person which grants the holder of such a right specific entitlements.[208] Servitudes grant powers of use and enjoyment to a person other than the owner and require the owner of the land to refrain from exercising one or more of his entitlements of ownership.[209] The implication of the *Linvestment* judgment is that the owner of the dominant estate was deprived of at least an aspect of his registered servitutal entitlement, namely the right to have a say in the location of the servitude. It can be said that the interest that the owner of the dominant estate has over the servient estate is a real interest in property which ought to qualify for protection in terms of section 25 of the Constitution.

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[206] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA).

[207] Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The Principles of The Law of Property in South Africa* (2010) 239.

[208] Van der Merwe CG *Sakereg* (2nd ed 1989) 458 The author quotes Puchta GF *Pandekten* edited by Rudorff AF (11th ed 1872) par 178; Arndts L *Lehrbuch des Pandekten* edited by Pfaff L and Hofmann F (14th ed 1889) par 175 and Dernburg H *Pandekten* (6th ed 1900) par 235; Voet 7 1 1; Van Leeuwen *RHR* 2 19 1. See *Dreyer v Letterstedt's Executors* (1865) 5 Searle 88 at 99; *Dreyer v Ireland* (1874) 4 Buch 193 at 199; *L*orentz v *Melle & Others* 1978 (3) SA 1044 (T) 1049. See further Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 321; Van der Merwe CG "Servitudes and other real rights" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 591-629 at 592. See Van der Merwe CG & De Waal MJ *The Law of Things and Servitudes* (1993) para 215.

[209] Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The Principles of The Law of Property in South Africa* (2010) 236.

Secondly, it had to be determined whether there was a deprivation of the property. It can be argued that a deprivation occurred in *Linvestment* when the court authorised the unilateral relocation of a specified servitude of right of way by a servient owner. Relocating a right of way that has been registered and clearly defined in the title deed has the effect of depriving the dominant owner of a right that he held, namely to have a say in the location of the servitude. In the court *a quo* of *Linvestment*, the court held that "the effecting of the alterations to the subject of the servitude by the owner of the servient tenement without the concurrence of the owner of the dominant tenement, invades the proprietary rights of the owner of the dominant tenement as contained in section 25(1) of the Constitution".[210]

In the third instance, it had to be determined whether the deprivation was consistent with the provisions of section 25(1) of the Constitution. Section 25(1) provides that no one may be deprived of property except in terms of law of general application, and that no law may permit arbitrary deprivation of property. It is clear that the recently developed common law rule, namely that the owner of the servient estate is entitled to relocate a servitude unilaterally, is law of general application since the rule aims to strike a balance between the competing interests and rights of both parties.

A deprivation will be regarded as arbitrary if there is not a sufficient reason for the deprivation or if it is procedurally unfair. The court in *Linvestment* did not stipulate whether obtaining judicial consent was a prerequisite for a unilateral relocation of a specified servitude of right of way to take place. The absence of a declaratory order authorising the relocation of a servitude of right of way may be procedurally unfair where it would allow the owner of the servient land to use self-help.[211] Conversely, it may be argued that the outcome of the *Linvestment* case, where the court did not explicitly stipulate that judicial consent should be required prior to the unilateral relocation of a specified servitude of right of way, is not procedurally unfair, because the court mentioned strict requirements that have to be complied with before the owner of the servient tenement may relocate a servitude. If the fairness criteria are not met by the owner of the servient tenement, it is likely that a court will order that the servitude should be located back to its original position. The mere fact that the servient owners' run the risk that the unilateral relocation would be

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[210] *Linvestment CC v Hammersley and Another* [2007] 3 All SA 618 (N) para 42.
[211] See Chapter 5 section 5.4.

negated if they do not comply with the criteria of the flexible legal approach serves as a deterrent to prevent abusive unilateral relocations.[212] On the surface it does not seem as if the new rule interferes with the right of the owner of the dominant estate too severely, because the court held that an existing servitude of right of way may only be altered if the owner of the servient tenement will be materially inconvenienced in the use of his property if the status *quo* is maintained, if the relocation will not prejudice the owner of the dominant tenement and if the owner of the servient tenement pays all costs incurred in the relocation of the servitude.[213]

If the deprivation is not consistent with the provisions of section 25(1) of the Constitution, the next step of the analysis would be to determine whether the deprivation is justified under section 36 of the Constitution. There is a possibility that the deprivation in *Linvestment* may be procedurally unfair in the absence of a court order. Therefore, the next step of the analysis will be to determine whether the deprivation is justifiable and reasonable in terms of section 36 of the Constitution. It appears as though the deprivation in *Linvestment* would either not be arbitrary due to the fact that the deprivation is substantively marginal and provided that it was authorised by a court order; or it might be procedurally unfair in the absence of a court order. In the latter case the deprivation might not be reasonable and justifiable because there is a less restrictive means to achieve the same purpose, namely by requiring a court order.

If the deprivation complies with section 25(1) or if it is justified under section 36 of the Constitution, the question will be whether the deprivation amounts to expropriation for purposes of section 25(2). Section 25(2) of the Constitution provides that property may only be expropriated in terms of law of general application, for a public purpose or in the public interest. It also states that expropriation is subject to compensation that is just and equitable. Even though there is a possibility that the outcome of the *Linvestment* judgment may be in compliance with the requirements of section 25(1) and section 36 of the Constitution (provided that relocation is authorised by a court order), it does not seem as if this particular deprivation could amount to an expropriation. The common law rule

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[212] *Brian v Bowlus* 399 So 2d 545 (La 1981) at 549. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 57-58. See Chapter 5 section 5.4.3.

[213] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 35.

pertaining to the relocation of a specified servitude of right of way does not result in a compulsory state acquisition of property. The *Linvestment* judgment cannot be characterised as an expropriation, because the deprivation was not aimed at forcibly acquiring property for a public purpose.[214] The purpose of the rule is to make one party better off without making the other party worse off and also to improve the use of private land.[215]

The policy grounds on which the court in *Linvestment* based its decision are to a certain extent convincing, since the law needs to be continually changed in order to meet changing conditions. The following chapter aims to assess the policy arguments regarding the selection of an appropriate rule which will have the effect of creating an efficient outcome for both owners of the servient and dominant estate more extensively.

[214] Van der Walt AJ *Constitutional Property Law* (2005) 242-269.
[215] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1 – 15 at 5. See footnote 224 in Van der Walt AJ *Constitutional Property Law* (2005) 239.

Chapter 5: Policy Analysis

5.1 Introduction

An essential component of landownership in society is the limitation of property rights.[1] Ownership in property can never be absolute,[2] and it will be limited if it is in the interest of the community, neighbours and other holders of rights.[3] A servitude is an example of the way in which the rights of an owner of property may be limited. Servitudes provide landowners with a legal mechanism to accommodate multiple property interests in land.[4] Any change in the law of servitudes has a potentially large impact on property ownership because servitudes are connected to most parcels of land.[5] The court in *Linvestment CC v Hammersley*[6] (*Linvestment*) stated that an order declaring the relocation of a specified servitude of right of way without the consent of the owner of the dominant tenement will only be granted if the servient owner is or will be materially inconvenienced in the use of his property if the status *quo ante* were maintained.[7] The servient owner will be authorised to relocate the servitude unilaterally if the relocation will not prejudice the owner of the dominant tenement and if the servient owner pays the expenses upon such relocation.

The importance of the *Linvestment* case is that the court decided that the owner of a servient tenement may unilaterally change the route of a defined right of way, thereby overturning a long-established precedent relating to servitudes based on the grounds of convenience and equity.[8] This chapter will evaluate whether it is justifiable for courts to overturn long-established common law principles based on the grounds of justice, equity and practicality. This chapter will investigate whether the policy reasons provided in

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[1] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1693.
[2] *Colonial Development (Pty) Ltd v Outer West Local Council* 2002 (2) SA 589 (N) 610; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 93-94.
[3] See examples of limitations imposed on ownership in Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 94-132.
[4] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1693.
[5] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1693.
[6] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA).
[7] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 35.
[8] Chadwick I "SCA Rules Servitudes can Change – *Linvestment CC v Hammersley and Another*" (2008) Jul *De Rebus* 42-43.

Linvestment CC v Hammersley[9] (*Linvestment*) to reach its conclusion that a unilateral relocation of a specified servitude of right of way is possible in South African law, are convincing and sufficient. The issue is to determine which of the two legal approaches is the correct one, to adhere to the traditional common law rule which prohibits the unilateral relocation of the servitude by the owner of the servient tenement unless consent has been obtained from the owner of the dominant tenement or to adopt the flexible legal approach that allows the unilateral relocation of a servitude.[10]

Furthermore, this chapter utilises law and economics theory to analyse the legal problem pertaining to the right of a servient tenement owner to relocate a servitude unilaterally. There are many reasons why the law and economics approach is useful. The concept of property is fundamental to both law and economics.[11] The law defines and protects the bundle of rights that constitute property.[12] The economic approach to property law emphasises the role of property law in promoting an efficient allocation of resources.[13] Law and economics theory provides an economic perspective on legal problems. The economic analysis of law can be divided into two subfields,[14] namely positive law and economics which uses economic analysis to predict the effects of various legal rules; and normative law and economics which entails the making of policy recommendations based on the economic consequences of various legal principles.

The key concept for normative economic analysis is efficiency.[15] Property law is the most fundamental area of common law from an economic perspective, because well-defined property rights are essential for market exchange and investment.[16] It is crucial that property rights should be clearly defined and understood because these rights impact on

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[9] [2008] 2 All SA 493 (SCA).
[10] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 8.
[11] Miceli TJ "Property" in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 at 246.
[12] Miceli TJ "Property" in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 at 246.
[13] Miceli TJ "Property" in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 at 246.
[14] Miceli TJ *The Economic Approach to Law* (2004) 2.
[15] Miceli TJ *The Economic Approach to Law* (2004) 2.
[16] Miceli TJ *The Economic Approach to Law* (2004) 203.

so many questions in the economic literature.[17] The economics literature further assumes that when rights are not clearly defined, this results in market failure.[18] The meaning of property rights is central to economics.[19] The role of property law in this context is to assign and protect property rights as a background for economic activities.[20] The economic approach to property law emphasises the role of property law in promoting an efficient allocation of resources.[21] An efficient allocation of resources will only be achieved by creating and protecting rights in order to encourage exchange and investment.[22] This chapter aims to assess the on-going debate regarding the selection of an appropriate rule from a law and economics point of view which will have the effect of creating an efficient outcome for the owners of both the servient and the dominant tenement.

The arguments pertaining to the traditional common law and the flexible legal approach to relocation of servitudes will be discussed in the first part of the chapter. Subsequently, both approaches will be evaluated with regard to the competing rights and interests of property holders by means of applying various law and economic theories. Issues that will be addressed are whether a choice between the two rules matters, whether decision makers should prefer clear "property rules" or muddier "liability rules"[23] and the different proposals as to how the rules can be improved in order to strike a balance between the interests of the different parties to the servitude-creating contract.

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[17] Cole DH & Grossman PZ "The meaning of property rights: Law versus economics?" (2002) 78 *Land Economics* 317-330 at 317.
[18] Cole DH & Grossman PZ "The meaning of property rights: Law versus economics?" (2002) 78 *Land Economics* 317-330 at 317; Miceli TJ *The Economic Approach to Law* (2004) 163.
[19] Cole DH & Grossman PZ "The meaning of property rights: Law versus economics?" (2002) 78 *Land Economics* 317-330 at 317.
[20] Miceli TJ *The Economic Approach to Law* (2004) 203.
[21] Miceli TJ "Property" in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 at 246.
[22] Miceli TJ "Property" in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 at 246.
[23] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 5. See Calabresi G & Melamed AD "Property rules, liability rules and inalienability: One view of the cathedral" (1972) 85 *Harv LR* 1089-1128 at 1092.

5.2 Rationales supporting the traditional common law position

Prior to the *Linvestment* judgment, the common law required that mutual consent be obtained in order to relocate a specified servitude of right of way.[24] Jurisdictions adhering to the traditional common law rule offer a number of rationales in support of its application.[25] Firstly, one very old and common rationale for the traditional common law rule is that it promotes certainty in landownership.[26] The uncertainty created by the flexible legal approach[27] would discourage the owner of the dominant tenement from developing his property for fear that any unilateral relocation of the servitude by the servient owner would frustrate that development.[28] This fear may lead to depreciation in the value of the dominant tenement.[29] The traditional common law rule creates certainty in landownership.[30] It encourages investment in dominant tenements while at the same time avoiding uncertainty and discouraging excessive litigation.[31] In the US judgment of *Stamatis v Johnson*[32] the court held that if the location of a servitude is treated as variable it would incite litigation and depreciate the value and discourage the improvement of the

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[24] *Gardens Estate Ltd v Lewis* 1920 AD 144.
[25] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1694.
[26] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1694.
[27] Most of the articles cited in this chapter are based on the US law regarding the unilateral relocation of a specified servitude of right of way. The American Law Institute *Restatement of the Law – Property Restatement (Third) of Property: Servitudes* § 4.8(2) (2000) *Location, Relocation, and Dimensions of a Servitude* regulates the unilateral relocation of a specified servitude of right of way. In these articles, the US academics analyse the policy reasons pertaining to the relocation of servitudes from the perspective of the Restatement (Third) of Property: Servitudes § 4.8(1) (2000). The Restatement (Third) of Property: Servitudes § 4.8(1) (2000) is equivalent to the approach adopted in *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA). Instead of using the US terminology from the Restatement (Third) of Property: Servitudes § 4.8(1) (2000), the terminology "flexible legal approach" will be used in the main text. This terminology refers to the new approach pertaining to the unilateral relocation of servitudes as adopted by the Supreme Court of Appeal in *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA).
[28] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1694.
[29] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1694. See *Hollosy v Gershkowitz* 88 Ohio App 198, 98 NE 2d 314 (Ohio Ct App 1950) 316.
[30] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 20.
[31] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 20.
[32] *Stamatis v Johnson* 71 Ariz 134, 224 P 2d 201 (1950) 202-203.

land over which the servitude is registered. This decision has been confirmed in *Davis v Bruk*.[33]

The second commonly asserted rationale in support of the traditional common law rule is rooted in assumptions about parties' expectations about servitude relocation.[34] Courts and scholars argue that if the common law rule of no unilateral relocation is discarded, it will lead to servient owners obtaining economic windfalls and servitude holders being unjustly deprived of part of their rights.[35] According to Lovett[36] the assumption is that when a servitude is created, the grantor receives consideration not only for giving the grantee non-possessory rights to use the servient owner's property, but also for the permanent localisation of the servitude.[37] Under the traditional common law rule, the owner of the dominant tenement included in his purchase price the value of a fixed servitude when he purchased the right to the servitude or when he purchased property that already enjoyed the benefit of the servitude.[38] From a law and economics perspective, it has been argued that it may be presumed that the fact that the fixed servitude cannot be relocated without the dominant owner's consent makes it more valuable than a servitude that can be relocated unilaterally.[39] On the contrary, it is likely that if the owner of the servient tenement granted the servitude, he will command a higher price for a fixed servitude than a variable one.[40] Alternatively, if the owner of a servient tenement purchased property already burdened by a fixed servitude, it is presumed that the servient owner paid a lower

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[33] *Davis v Bruk* 411 A 2d 660 (Me 1980) 665.
[34] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 21.
[35] *Davis v Bruk* 411 A 2d 660 (Me 1980) 665; Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 21; Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1695.
[36] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 21; Orth JV "Relocating easements: A response to Professor French" (2004) 38 *Real Prop Prob & Tr J* 643-654 at 648: "[I]t may defeat an intention that the easement not be relocated without consent even if that was not expressly stated in the deed".
[37] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 21; Orth JV "Relocating easements: A response to Professor French" (2004) 38 *Real Prop Prob & Tr J* 643-654 at 648.
[38] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1695.
[39] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1695.
[40] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1695.

price for the property than he would have had the servitude been variable.[41] The argument is that if a court permits the owner of the servient tenement to relocate the servitude, the value of the servitude to each party will no longer comport with the price that each party paid.[42] The reason for this is that the owner of the dominant tenement will have paid too much for his property right and the owner of the servient tenement too little.[43]

A third argument in favour of the traditional common law rule is that it balances the restrictions placed on both parties to the servitutal relationship.[44] This argument is based on the fact that the traditional common law rule prohibits the owners of both the servient and the dominant tenement respectively from relocating a servitude unilaterally without the other party's consent.[45] Critics such as Orth argue that if this is the case, then the flexible legal approach should be made symmetrical.[46] Orth[47] criticises the flexible legal approach and concludes that it is asymmetrical and unfair because it retains the common law rule forbidding relocation by the holder of the servitude, while at the same time conferring on the servient owner the right to make unconsented relocations. Unless the holder of the servitude is given a correlative right to relocate a servitude, provided there is no diminution in the utility of the burdened land, it is unfair to give this right to only the servient owner.[48]

The final argument in favour of the traditional common law rule is based on the nature of a servitude.[49] According to this rationale, even if a new servitude location would not cause any harm to the holder of the servitude and even if it is beneficial to the dominant owner, a

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[41] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1695.
[42] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1695.
[43] See footnote 16 in Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1695: "This rationale will only be applicable to circumstances in which the default rule changes after the parties have purchased their rights in property. Therefore, this rationale is important only in a retrospective sense, and only a finite group of property owners would be affected."
[44] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 22.
[45] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 22.
[46] Orth JV "Relocating easements: A response to Professor French" (2004) 38 *Real Prop Prob & Tr J* 643-654 at 643.
[47] Orth JV "Relocating easements: A response to Professor French" (2004) 38 *Real Prop Prob & Tr J* 643-654 at 643.
[48] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 23.
[49] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 23.

servitude is nothing less than a fixed and judicially unchangeable property right.[50] A servitude is envisaged as a static and permanent property right that the holder of a servitude can control by means of power.[51] This right is subject to the rule that the holder of the servitude does not interfere with the servient owner's use of the land in ways unrelated to the servitude.[52]

French criticises the application of the traditional common law approach. French argues that the traditional rule puts the landowner at the mercy of the owner of the dominant tenement.[53] Under the traditional common law approach, the dominant owner can torpedo a proposed relocation even though the relocation poses no damage to his property.[54] The traditional common law approach creates an asymmetry in the rights of the parties, unfairly advantaging the holder of the servitude at the expense of the owner of the servient tenement.[55] The traditional rule is unfair towards the owner of the servient tenement since it "creates obstacles to the development of the servient tenement that are unrelated to the merits of the development".[56] Additionally, French[57] states that the traditional common law approach is generally unfair to servient owners because it is based on the implausible assumption that the transaction granting the servitude encompasses a knowing exchange of future development rights. The traditional common law approach is regarded as unfair because it prohibits the owner of the servient tenement to make changes to the servitude which may be essential for future development of the servient tenement.[58] The traditional

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[50] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 23.
[51] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 23. See Orth JV "Relocating easements: A response to Professor French" (2004) 38 *Real Prop Prob & Tr J* 643-654 at 649.
[52] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 23.
[53] I have paraphrased French's criticism against the application of the traditional common law approach. See French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 10.
[54] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 10.
[55] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 11-12.
[56] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 14.
[57] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 14.
[58] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 14-15.

common law approach is also unfair because it rewards the non-cooperating dominant owner with the ability to extract all the surplus value created by the relocation of the servitude even though the dominant owner incurs no costs and suffers no harm.[59]

5.3 Rationales supporting the flexible legal approach

The flexible legal approach provides that an existing servitude of right of way may be altered, provided that the servient owner will be materially inconvenienced in the use of his property if the status *quo* is maintained, the relocation will not prejudice the owner of the dominant tenement and the servient owner pays all costs incurred in the relocation of the servitude.[60] The question arises whether a landowner should have the right to relocate a servitude registered over his property without the consent of the owner of the dominant tenement.[61] According to French,[62] the answer to this question would be in the negative, because altering the location of the servitude may reduce the utility of the servitude to the owner of the dominant tenement and deprive the dominant owner of the benefit bargained for.[63] French[64] questioned whether it would be possible for a servitude to be relocated without causing any utility loss to the holder of the servitude in the case where a

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[59] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 15.

[60] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA). In *Linvestment CC v Hammersley & Another* [2008] 2 All SA 493 (SCA) para 31 the court held that the interests of justice required a revision of the common law relating to servitudes. Heher JA said: "Servitudes are by their nature often the creation of preceding generations devised in another time to serve ends which must now be satisfied in a different environment. Imagine a right of way over a farm portion registered fifty years ago. Since then new public roads have been created providing new access to the dominant tenement, the nature of the environment has changed, the contracting parties have long gone. Properly regulated flexibility will not set an unhealthy precedent or encourage abuse. Nor will it cheapen the value of registered title or prejudice third parties." *Rubidge v McCabe & Sons and Others, McCabe & Sons and Others v Rubidge* 1913 AD 433 illustrated that a servient owner will be able to relocate a servitude when circumstances arise that will make it advantageous to the servient tenement to use that locality in such a way as to obstruct the road, the servient owner may relocate the route if the alternative route is equally suitable. See Chapter 2.

[61] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 1.

[62] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 1.

[63] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 1.

[64] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 1.

landowner wishes to develop the land that is subject to the servitude. French[65] advocates that it is possible to relocate a servitude without creating material inconvenience to the holder of the servitude. This is because the flexible legal approach states that the particular parties in the dispute are entitled to the unilateral relocation of the servitude, provided that the alteration of the servitude does not lessen the utility of the servitude, that it does not burden the owner of the dominant tenement by frustrating the purpose for which the servitude was created and that the owner of the servient tenement bears the expenses upon such relocation.[66] According to French[67] the courts should welcome the opportunity to increase the general welfare by adopting the flexible legal approach, because the rule has the effect of making one party better off without making the other party worse off. In order to justify her arguments for preferring the flexible legal approach instead of the traditional common law approach, French[68] refers to some judgments in New York and Colorado where the flexible legal approach was favoured.

Various reasons have been provided in favour of the application of the flexible legal approach rather than the application of the traditional common law approach. The first reason is that the original parties to the contract most probably did not intend to create a right of way that could not be altered by the owner of the servient tenement.[69] The second reason is that if the right to relocate the servitude unilaterally is awarded to the servient landowner it may have the effect of striking a balance between the servient owner's right to use and enjoy his property and the dominant owner's right of ingress and egress.[70] The third reason is that the flexible legal approach may increase the value of the servient tenement as it encourages the servient owner to make improvements.[71] The flexible legal approach may also decrease the amount of litigation. In *Lewis v Young*[72] (*Lewis*), the court stated that "both the owner of the dominant and servient tenement have an incentive to

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[65] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15.
[66] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 35.
[67] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 5.
[68] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 6.
[69] *Lewis v Young* 705 N E 2d 649 (NY 1998) 652.
[70] *Lewis v Young* 705 NE 2d 649 (NY 1998) 652.
[71] *Lewis v Young* 705 NE 2d 649 (NY 1998) 653.
[72] *Lewis v Young* 705 NE 2d 649 (NY 1998) 653.

resolve a dispute pertaining to the relocation of a specified servitude of right of way prior to relocation because the servient owner's right to relocate a right of way without consent is limited to the extent that relocation may not impair the dominant owner's rights".[73] Furthermore, the court in *Lewis* asserted the following reason for why the flexible legal approach may decrease the amount of litigation:

> "The dominant owner has an interest in influencing the servient owner's choice of a new location, and the landowner will want to avoid the risk and costs involved of allowing a court to make an after-the-fact determination as to the correctness of the relocation".[74]

The court in *Lewis* concluded that all of the concerns are adequately addressed by the flexible legal approach, namely that a servient owner may not relocate a servitude unilaterally if such relocation would prejudice the rights of the dominant owner.[75]

The fourth reason for French's selection of the flexible legal approach is that this approach "maximizes the overall utility of the land" since the servient tenement profits from an increase in value while the dominant tenement suffers no decrease at all.[76] The flexible legal approach provides the owner of the servient tenement with the ability to make the most economic use of his or her land that may not have been foreseen when the servitude was created.[77] The court in *Roaring Fork Club LP v St Jude's Co*[78] also dealt with the court's argument in *Davis v Bruk*,[79] namely that allowing the servient owner to relocate a specified servitude of right of way unilaterally may confer a sudden unexpected piece of good fortune and personal gain on the owner of the servient tenement. In *Roaring Fork Club LP v St Jude's Co*[80] (*Roaring Fork Club*), the court mentioned that each property owner should be able to make use of his or her property to the full as authorised by law, provided that they comply with the requirement not to prejudice each other's rights relating

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[73] *Lewis v Young* 705 NE 2d 649 (NY 1998) 653.
[74] *Lewis v Young* 705 NE 2d 649 (NY 1998) 653.
[75] *Lewis v Young* 705 NE 2d 649 (NY 1998) 653. See French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 6-7.
[76] *Roaring Fork Club LP v St Jude's Co* 36 P 3d 1229 (Colo 2001) 1236.
[77] *Roaring Fork Club LP v St Jude's Co* 36 P 3d 1229 (Colo 2001) 1236.
[78] 36 P 3d 1229 (Colo 2001) 1236.
[79] *Davis v Bruk* 411 A 2d 660 (Me 1980) 664-666. In this case the court stated that judicial relocation of established easements could create uncertainty in real estate transactions.
[80] *Roaring Fork Club LP v St Jude's Co* 36 P 3d 1229 (Colo 2001) 1237.

to the property. The court in *Roaring Fork Club* said that the economic gain of the owner of the servient tenement will be tempered by the servient owner incurring the expense of relocating the servitude and ensuring that it complies with the parameters of the flexible legal approach.[81] The court in *Roaring Fork Club* assessed the overall fairness of the two approaches:

> "The old rule creates a 'bilateral monopoly'[82] in that neither owner can transact with anyone else.[83] While the Restatement rule 'imposes upon the servitude holder the burden and risk of bringing suit against an unreasonable relocation' it 'far surpasses in utility and fairness the traditional rule that left the servient land owner remediless against an unreasonable servitude holder.'[84] The Restatement rule operates to redistribute the (one-sided) burden the traditional rule places on the estate burdened by the servitude."[85]

French[86] mentions a number of reasons to justify her advocacy for a more flexible legal approach pertaining to the relocation of a specified servitude of right of way. The flexible legal approach does not put the servient owner at the mercy of the owner of the dominant tenement.[87] The servient owner can relocate only if the dominant owner suffers no damage.[88] In terms of the traditional common law approach, the dominant owner can claim and expect to get almost all the surplus value created by any relocation, whereas if the

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[81] *Roaring Fork Club LP v St Jude's Co* 36 P 3d 1229 (Colo 2001) 1237.
[82] Bell A & Parchomovsky G "Pliability rules" (2002) 101 *Mich LR* 1-79 at 62. Bell & Parchomovsky define "bilateral monopoly" as occurring when "there is one potential buyer and one potential seller" and "each knows that the transaction cannot take place without her cooperation, and each, therefore, attempts to extract all the profit from the transaction". Bell & Parchomovsky illustrate the problem of bilateral monopoly by using the example of a government decision to build a railway through an isolated valley: "There is only one railway, and therefore only one potential buyer of valley land. On the other hand, the railroad must purchase all the valley parcels along the lay of the track; even one hold-out can ruin the project. Each parcel owner is thus a monopolist who may attempt to hold out for a higher price that will divert the railroad profits to her own pockets."
[83] The court cites footnote 19 in Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1701.
[84] The court quotes Harris DB "Balancing the equities: Is Missouri adopting a progressive rule for relocation of easements?" (1996) 61 *Mo LR* 1039-1063.
[85] *Roaring Fork Club LP v St Jude's Co* 36 P 3d 1229 (Colo 2001) 1237.
[86] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 10-12.
[87] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 10.
[88] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 10.

development made possible by relocation of the servitude increases the value of the servient tenement, the owner of the servient tenement will be better off by the amount of that increase.[89] French[90] argues that the flexible legal rules are designed to accommodate the interests of both the servient owners and dominant owners and to allow each of the owners to maximize the utility of his or her property without damaging the other.[91] French[92] favours the flexible legal approach because it surpasses the traditional rule in utility and fairness.

5.4 The traditional common law rule and the flexible legal approach from a law and economics perspective

5.4.1 Calabresi and Melamed's property and liability rule paradigm

Miceli states that the role of law is to assign property rights.[93] He also argues that law provides rules that govern voluntary transactions and remedies for violation of rights.[94] The rules for enforcing property rights may affect the allocation of resources because these rules dictate how property rights can be transferred and what remedies are available for infringements.[95] This part of the chapter will evaluate the legal issue pertaining to the relocation of a specified servitude of right of way from the perspective of Calabresi and Melamed's property and liability rule paradigm. This section will evaluate the economic repercussions of the choice of enforcement rules. Calabresi and Melamed developed an economic theory of rules for transferring rights that is a natural extension of Coase's

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[89] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 10.
[90] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 11.
[91] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 11-12.
[92] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 15.
[93] Miceli TJ "Property" in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 at 249.
[94] Miceli TJ "Property" in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 at 249.
[95] Miceli TJ *The Economic Approach to Law* (2004) 176.

analysis of the externality problem.[96] Calabresi and Melamed's theory could be helpful in deciding how the rules pertaining to the unilateral relocation of a specified servitude of right of way ought to be defined and assigned to the contracting parties.

As a point of departure, Calabresi and Melamed draw a distinction between two types of rules to protect property rights, namely property rules and liability rules.[97] Property rules allow the right-holders to enjoin all attempts to acquire the right on terms that they deem to be unacceptable.[98] Liability rules allow right-holders to seek monetary compensation awarded by a court for seizures of the right.[99] The key distinction lies in the fact that in the case of property rules, the right-holder's consent is required for a transfer under the property rule; however, consent will not be required under a liability rule.[100] Under liability rules, the party seeking to acquire the right can do so without obtaining the right-holder's consent.[101] However, the acquirer of the right must be willing to pay compensation for the holder's loss.[102] The trade-off is that if consent is required, it will guarantee that any exchanges that occur will be mutually beneficial and therefore efficient.[103] However, the transaction costs involved in obtaining consent will sometimes be too high and will prevent otherwise efficient exchanges.[104] The trade-off suggests that property rules should be the preferred remedy when transaction costs are low, because they facilitate mutually beneficial bargaining between private parties.[105] By contrast, liability rules should be preferred when transaction costs are high since liability rules allow the court to coerce

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[96] Miceli TJ "Property" in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 at 249.
[97] Miceli TJ "Property" in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 at 249.
[98] Miceli TJ "Property" in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 at 249.
[99] Miceli TJ "Property" in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 at 249.
[100] Miceli TJ "Property" in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 at 249.
[101] Miceli TJ *The Economic Approach to Law* (2004) 176.
[102] Miceli TJ *The Economic Approach to Law* (2004) 176.
[103] See the arguments discussed above in favour of the traditional common law rule regarding the relocation of a specified servitude of right of way. See also Miceli TJ "Property" in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 at 249.
[104] Miceli TJ "Property" in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 at 249.
[105] Miceli TJ "Property" in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 at 249. See Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710.

exchanges when bargaining is not possible.[106] The theorem regarding the choice between property rules and liability rules forms the core of the economic theory of property law.[107]

Calabresi and Melamed[108] illustrate the way in which legal disputes can be solved by application of either property or liability rules. Calabresi and Melamed[109] illustrate their property and liability paradigm by describing how a legal dispute involving a homeowner complaining about emissions from a nearby cement factory could be resolved by application of either two alternative property rules or two alternative liability rules.[110] Rule one assumes that the homeowner has an entitlement to be free of pollution. The homeowner has a property right and can obtain an interdict to stop the pollution. Rule three assumes that the factory owner possesses an entitlement to make polluting emissions when a court allows the pollution to continue unabated despite complaints. The homeowner cannot obtain any remedy. The first liability rule variation (Rule two) occurs when the homeowner's entitlement to be free of pollution is protected, not by means of an interdict, but by a damage award (a liability rule) that is intended to compensate the homeowner for the damage inflicted upon his entitlement. Rule four is the second liability rule variation and will occur when the factory owner's entitlement to pollute may be bought by the homeowner at some measure of just compensation.

According to Lovett, this property and liability rule paradigm contributes to legal scholarship in two ways.[111] First, it provides legal scholars with the ability to visualise "a pattern of entitlement enforcement" by which the prevailing party's entitlement may be vindicated in one of two ways, either through a property rule or through a liability rule, no matter who wins the dispute about an entitlement.[112] Secondly, the establishment of the

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[106] Miceli TJ "Property" in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 at 249.
[107] Miceli TJ "Property" in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 at 249.
[108] Calabresi G & Melamed AD "Property rules, liability rules and inalienability: One view of the cathedral" (1972) 85 *Harv LR* 1089-1128 at 1115-1116.
[109] Calabresi G & Melamed AD "Property rules, liability rules and inalienability: One view of the cathedral" (1972) 85 *Harv LR* 1089-1128 at 1115-1116.
[110] See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 9-10.
[111] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 9.
[112] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 9.

property and liability rule paradigm led to a normative inquiry into the question of when property rules and when liability rules should be implemented by courts and policy makers.[113]

The question that remains to be addressed is whether decision makers should prefer clear property rules or muddier liability rules.[114] The abovementioned question also arises in the legal issue relating to the relocation of servitudes, namely whether the traditional common law approach should be applicable or whether the flexible legal approach should be applicable.

The insights drawn from Calabresi and Melamed's property and liability rule paradigm can be applied to frame the debate about the relocation of servitudes.[115] The traditional common law rule is essentially a property rule that provides the owner of the dominant tenement with the entitlement to maintain the original location of the servitude.[116] The entitlement of the owner of the dominant tenement will be protected through injunctive relief (an interdict) because any unlawful interference with the servitude by the owner of the servient tenement will be regarded as a form of trespass.[117] The servient owner's only way to relocate the servitude (assuming relocation rights were not preserved in the instrument creating the servitude) will be through bargaining.[118] If the primary goal of the law of servitudes is to achieve economic efficiency and if the cost of bargaining and completing a transaction that affects relocation rights is minimal, then most scholars would argue that a property rule approach should be applicable.[119] Most scholars prefer the application of property rules instead of liability rules because, as an entitlement protection

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[113] See Rose CM "The shadow of the cathedral" (1997) 106 *Yale LJ* 2175-2200 at 2178*;* Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 9.

[114] Calabresi G & Melamed AD "Property rules, liability rules and inalienability: One view of the cathedral" (1972) 85 *Harv LR* 1089-1128 at 1089, 1092.

[115] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 4.

[116] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 24.

[117] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 24.

[118] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 24.

[119] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 25.

mechanism, property rules are simple and clear.[120] They reduce uncertainty.[121] Property rules provide entitlement holders with the right to preserve their property interests without any fear that their interest may be taken away by opportunists.[122] They also encourage individual investment and planning.[123] It is also stated that the tendency of property rules to define rights and identify right-holders clearly promotes consensual bargaining.[124] Bell and Parchomovsky are correct when they state that Calabresi and Melamed's clarification of the concepts of property and liability rules has "solidified the dominance of private ordering over public ordering" and that they have led many to presume that private bargaining should "take precedence over legal intervention".[125] It is only when private bargaining is ineffective that legal intervention should be the last resort.[126]

In addition to the abovementioned arguments favouring the application of property rules, the next part of this section will provide a pragmatic discussion as to why property rules should be applied to dictate how property rights regarding the relocation of servitudes should be transferred. The aim of the Harvard Law Review Note[127] discussed below is to select a rule that will have the effect of creating an efficient outcome for owners of both the servient and the dominant tenement. The next part of the chapter will evaluate the traditional common law approach and the flexible legal approach from two analytical perspectives.[128] First, the chapter will examine whether the choice between the traditional common law and flexible legal approach will affect the parties' actions. Second, the chapter will focus on the social values embedded in the law of servitudes to establish

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[120] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 12.
[121] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 12.
[122] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 12.
[123] Rose CM "The shadow of the cathedral" (1997) 106 *Yale LJ* 2175-2200 at 2187.
[124] See Krier JE & Schwab SJ "Property rules and liability rules: The cathedral in another light" (1995) 70 *NYU LR* 440-483 at 464-465 and footnote 72; Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 13.
[125] Bell A & Parchomovsky G "Pliability rules" (2002) 101 *Mich LR* 1-79 at 14. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 13.
[126] Bell A & Parchomovsky G "Pliability rules" (2002) 101 *Mich LR* 1-79 at 14.
[127] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710.
[128] See Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1698.

whether one of the rules will more faithfully promote the property interests of the dominant or servient owner.

The first question is whether the choice between the traditional rule and the new rule will affect the parties' action. If one applies the Coase theorem, it does not matter which one of the two rules a jurisdiction chooses to adopt, particularly in cases where the parties to a servitutal relationship can contract around the rule or when they can rely on authoritarian norms that exist independently of the law.[129] According to the Coase theorem, the efficient outcome can be achieved without government intervention if transaction costs are low, regardless of how initial property rights are assigned to individuals in externality settings.[130] Another way of describing the Coase theorem is that the initial assignment of property rights is irrelevant to the final allocation of resources.[131] The Coase theorem suggests that the owners of the dominant and servient tenement would negotiate when determining an appropriate location for the servitude, regardless of whether the common law or the flexible legal approach was in force.[132] It has been indicated that the transaction costs that are normally associated with bargaining between the owners of the dominant and servient tenements may prohibit the realisation of the efficient outcome through bargaining.[133] The Coasean theorem is ineffective to solve the issues relating to the unilateral relocation of a specified servitude of right of way, because there may be a possibility that cultural impediments may hinder residential neighbours from approaching one another and offering an exchange.[134] There is also the possibility that at least one of the parties will be an organisation and that decision and get-together costs may become

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[129] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1698.
[130] Miceli TJ "Property" in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 at 246-247. See further Parisi F "Coase theorem and transaction cost economics in the law" in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2005) 7-39.
[131] Miceli TJ "Property" in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 at 247.
[132] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1699.
[133] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1699.
[134] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1699.

significant.[135] When bargaining occurs between the organisation and the individual, it will require a person to determine the appropriate representative of the organisation to negotiate with.[136] The decision making procedure in an organisation may be burdensome.[137] As a result of the potential friction in bargaining, the choice of a particular legal rule may matter greatly.[138] Therefore, it has been argued that from an efficiency point of view the law should assign the entitlement to the party that values the entitlement the most.[139] However, in situations where it is impossible to determine whether the entitlement should be assigned to the owner of the servient or dominant tenement, the law should assign the entitlement so that bargaining will be initiated at the least cost.[140] It is impossible to determine whether the owner of the dominant tenement or of the servient tenement values the entitlement to prevent the relocation of a servitude or to relocate a servitude unilaterally more highly.[141] However, it is possible to determine which party would initiate bargaining at the least cost.[142] Therefore, assigning the entitlement to relocate the servitude unilaterally to the owner of the servient tenement without the consent of the owner of the dominant tenement, would lead to an increase in the costs of beginning the bargaining process because the owner of the servient tenement would have already invested significant resources in relocating the servitude.[143] The owner of the dominant tenement would incur information costs when he discovers the plans of the owner of the servient tenement to relocate the servitude.[144] The owner of the dominant

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[135] The following book is cited Anderson E *Value in Ethics and Economics* (1993) 150-152 in Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1700.
[136] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1700.
[137] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1700.
[138] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1700.
[139] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1700.
[140] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1700. See Cooter R "The cost of Coase" (1982) 11 *J Legal Stud* 1-33 at 1,14.
[141] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1700.
[142] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1700.
[143] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1700.
[144] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1700.

tenement will only know for certain of the planned relocation once the owner of the servient tenement has made some improvements to the servitude.[145] It is also likely that the owner of the servient tenement would incur preparation costs before making any visible improvements.[146] When the owner of the dominant tenement eventually becomes aware of the intention of the servient owner to relocate the servitude and initiates bargaining, the owner of the servient tenement might be reluctant to accept an offer from the owner of the dominant tenement to cease the relocation.[147] By contrast, assigning the entitlement to prevent the relocation of the servitude to the owner of the dominant tenement would make initiating the bargaining process less costly.[148] The bargaining process will be less costly because the common law rule compels the owner of the servient tenement to begin bargaining before incurring significant costs.[149]

From the abovementioned law and economics arguments relating to the relocation of servitudes, it becomes evident that the choice of a particular legal rule may be important because a dispute between a dominant and servient owner presents a bilateral monopoly problem.[150] A bilateral monopoly will arise in the case when there is only one seller and one buyer in a particular market.[151] When the parties to the servitutal agreement negotiate on whether the servitude should be relocated, the two parties present a bilateral monopoly problem since they can only transact with each other.[152] Economists acknowledge that none of the economic theories can predict the outcome of bargaining between the two monopolists.[153] The Coase theorem does not address the problem. It appears as if the

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[145] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1700-1701.
[146] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1700.
[147] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1701.
[148] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1701.
[149] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1701.
[150] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1701.
[151] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1701 footnote 50 cites Freeman AM *Intermediate Microeconomic Analysis* (1983) 427.
[152] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1701.
[153] Freeman AM *Intermediate Microeconomic Analysis* (1983) 427-428 is cited in Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1701.

Coase theorem assumes that the problem does not exist.[154] The Coase theorem fails to account for the manner that neighbours allocate property entitlements.[155] Theories about how individuals bargain with respect to or in spite of the formal law do not fully determine how the owners of property subject to the servitudes will behave.[156]

The next part of the chapter will focus on the social values embedded in the law of servitudes in order to establish whether one of the rules will more faithfully promote the property interests of the dominant or servient owner. In order to determine which legal rule should be adopted, the social values[157] embedded in property law ought to be taken into consideration as well. The issue that needs to be addressed relates to which policy goals the traditional common law approach and the flexible legal approach advance respectively.[158] The traditional common law rule establishes forced sharing between the servient and dominant owner.[159] It forces the parties to negotiate where to locate the servitude cooperatively.[160] In that sense, the property right that the common law rule aims to protect is not an entirely private property right.[161] The mere fact that the common law rule forces cooperation between the two parties does not make it inefficient.[162] Enforcing such cooperation between the owners of the dominant and servient tenement is good.[163] Maintaining the traditional common law rule forces both parties to recognise and develop their interdependence, because neither of the parties could relocate the easement without

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[154] The following article Hovenkamp H "Rationality in law & economics" (1992) 60 *Geo Wash LR* 293-338 at 293, 306-309 is cited in Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1701.

[155] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1701.

[156] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1705.

[157] One should be careful not to confuse the two terms, namely "values" and "rights". The term "values" refers to social goals or interests while "rights" refer to individual interests. See footnote 92 in Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1708.

[158] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1709.

[159] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1709.

[160] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1709.

[161] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1709.

[162] See footnote 100 in Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1709.

[163] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1709.

consulting the other.[164] The flexible legal approach is mostly concerned with the facilitation of property development.[165] However, the flexible legal approach fails to recognise that parties to a servitude are interdependent.[166] The flexible legal approach favours the economic interests of the servient owner only.[167]

A question that arises in the law and economic literature is why courts[168] and policy makers choose to substitute property rules with liability rules if property rules are regarded as being beneficial.[169] From an economic efficiency point of view it may be argued that the cost of establishing the value of an entitlement is so high that even though a transfer of the entitlement would benefit both parties, such a transfer will not occur.[170] There are also arguments that property rules afflict the market with a "bilateral monopoly" situation which eventually leads to "holdout" problems.[171] According to Epstein, the application of liability rules should be limited to those circumstances where property rules function inefficiently.[172] Lovett[173] states that liability rules can be helpful because if the value of the entitlement is judicially determined it will smooth the progress of the transaction (transfer of the entitlement) between the two contracting parties.[174] Liability rules facilitate transactions because the court can establish an efficient and fair price for the transfer of the entitlement, especially in situations where there is friction between the contracting parties

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[164] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1709.
[165] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1709.
[166] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1709.
[167] Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710 at 1710. See Chapter 5 section 5.2.
[168] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA).
[169] Calabresi G & Melamed AD "Property rules, liability rules and inalienability: One view of the cathedral" (1972) 85 *Harv LR* 1089-1128 at 1106.
[170] Calabresi G & Melamed AD "Property rules, liability rules and inalienability: One view of the cathedral" (1972) 85 *Harv LR* 1089-1128 at 1106. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 13.
[171] The definition of "bilateral monopoly" is explained in footnote 53. See further Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 13.
[172] Epstein RA "A clear view of the cathedral: The dominance of property rules" (1997) 106 *Yale LJ* 2091-2120 at 2094. See footnote 67 in Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 14.
[173] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 14.
[174] See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 14.

in the bargaining process and where the contracting parties refuse to reveal information about their actual valuations to accomplish a transfer.[175] The natural consequence of the abovementioned view is that in cases where the transaction costs are low, a property rule would be the best solution to achieve an optimal allocation of the entitlement, because it promotes consensual bargaining and the parties can make the valuations that will be necessary to achieve a transfer in a manner that is cheap and accurate.[176] According to Calabresi and Melamed[177] the common reason for implementing a liability rule instead of a property rule to protect an entitlement is because the market valuation implicit in property rules is regarded as inefficient.

The next part of the chapter will focus on the risks that arise when a legal system switches from property to liability rule protection.[178] Liability rules may create an undervaluation of entitlements in cases where entitlement holders are sentimentally attached to their entitlements.[179] Furthermore, the liability rules may result in risks of error and it may contribute to an increase in costs.[180] It is possible that problems may occur in obtaining and processing information (assessment costs) for purposes of damage calculations.[181] Liability rules may actually raise transaction costs; result in market avoidance; and discourage individuals from practicing self-reliance and long-term planning.[182] Finally, it may be argued that when liability rules are applied to possessory interests, the rules could

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[175] See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 14.
[176] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 14.
[177] Calabresi G & Melamed AD "Property rules, liability rules and inalienability: One view of the cathedral" (1972) 85 *Harv LR* 1089-1128 at 1110. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 14.
[178] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 15-16.
[179] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 15. See Calabresi G & Melamed AD "Property rules, liability rules and inalienability: One view of the cathedral" (1972) 85 *Harv LR* 1089-1128 at 1108.
[180] Krier JE & Schwab SJ "Property rules and liability rules and inalienability: The cathedral in another light" (1995) 70 *NYU LR* 440-483 at 453. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 15.
[181] Krier JE & Schwab SJ "Property rules and liability rules and inalienability: The cathedral in another light" (1995) 70 *NYU LR* 440-483 at 453. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 15.
[182] Krier JE & Schwab SJ "Property rules and liability rules and inalienability: The cathedral in another light" (1995) 70 *NYU LR* 440-483 at 464. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 15.

lead to "an infinite round of reciprocal takes and take-backs"[183] and could attract third parties to buy out rights by taking advantage of liability rules, which will eventually lead to a destabilisation of rights.[184]

5.4.2 Bell and Parchomovsky's pliability rule paradigm

Calabresi and Melamed interpreted the law as a structure consisting of three levels, namely inalienability rules at the ground level, property rules at the first floor and liability rules at the second.[185] According to Bell and Parchomovsky, the metaphor of Calabresi and Melamed is incomplete because it does not reflect the dynamism of the legal system.[186] Bell and Parchomovsky propose that pliability rules should be viewed as the "stairways between the floors and the corridors and doorways connecting rooms on those floors".[187] By contrast to Calabresi and Melamed's property and liability rule paradigm, Bell and Parchomovsky state that "property and liability rules do not exist in airtight doctrinal boxes in which an entitlement is always protected by only one kind of rule".[188] Bell and Parchomovsky aim to re-evaluate and improve upon Calabresi and Melamed's property and liability rules paradigm.[189] According to Bell and Parchomovsky, a more complete legal analysis that will probe beyond the dichotomy between property and liability rules is required.[190] In order to fully capture the protection of entitlements in the legal system, Bell and Parchomovsky added another level to Calabresi and Melamed's analysis, namely the

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[183] Kaplow L & Shavell S "Property rules versus liability rules: An economic analysis" (1996) 109 *Harv LR* 713-790 at 767-768; Rose CM "The shadow of the cathedral" (1997) 106 *Yale LJ* 2175-2200 at 2189. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 15-16.

[184] Kaplow L & Shavell S "Property rules versus liability rules: An economic analysis" (1996) 109 *Harv LR* 713-790 at 765-766; Rose CM "The shadow of the cathedral" (1997) 106 *Yale LJ* at 2175-2200 at 2189.

[185] Bell A & Parchomovsky G "Pliability rules" (2002) 101 *Mich LR* 1-79 at 25.

[186] Bell A & Parchomovsky G "Pliability rules" (2002) 101 *Mich LR* 1-79 at 25.

[187] Bell and Parchomovsky state that the entitlements described by the metaphor of Calabresi and Melamed should not include the rule in isolation, but should include the rule's interconnections as well. See Bell A & Parchomovsky G "Pliability rules" (2002) 101 *Mich LR* 1-79 at 25 and Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 16-17.

[188] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 16; Bell A & Parchomovsky G "Pliability rules" (2002) 101 *Mich LR* 1-79 at 5.

[189] Bell A & Parchomovsky G "Pliability rules" (2002) 101 *Mich LR* 1-79 at 4.

[190] Bell A & Parchomovsky G "Pliability rules" (2002) 101 *Mich LR* 1-79 at 4-5.

pliability rule paradigm.[191] Pliability rules provide the possibility of protecting legal entitlements in such a way that the protection of entitlements can shift between property and liability rules as long as some circumstances are present.[192] However, if the relevant condition changes, a different rule will protect the entitlement, as the circumstances dictate.[193] Therefore, pliability rules can be seen as dynamic rules, while property and liability rules are regarded as static.[194] A dynamic legal system allows the changing of entitlements as the needs of society change.[195] Bell and Parchomovsky's conceptual understanding does not focus on the legal protection of entitlements in isolation.[196]

Lovett is in favour of the pliability rule paradigm and argues that it is the best mechanism to dictate how the legal dispute regarding the relocation of servitudes ought to be regulated.[197] With the insights of Bell and Parchomovsky in mind, Lovett asserts that the flexible legal approach pertaining to the unilateral relocation of a specified servitude of right of way can be regarded as a classic pliability rule.[198] Classic pliability rules can be described as the transformation of an entitlement from property rule protection to liability rule protection.[199] Classic pliability rules take into account various instances where default property rule protection becomes inefficient or unfair.[200] A classic pliability rule starts with a

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[191] Bell A & Parchomovsky G "Pliability rules" (2002) 101 *Mich LR* 1-79 at 5.
[192] Bell A & Parchomovsky G "Pliability rules" (2002) 101 *Mich LR* 1-79 at 5; Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 16. See *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 35.
[193] Bell A & Parchomovsky G "Pliability rules" (2002) 101 *Mich LR* 1-79 at 5.
[194] Bell A & Parchomovsky G "Pliability rules" (2002) 101 *Mich LR* 1-79 at 5.
[195] Bell A & Parchomovsky G "Pliability rules" (2002) 101 *Mich LR* 1-79 at 25.
[196] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 16.
[197] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77.
[198] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 5; Bell and Parchomovsky discuss six prototypes of pliability rules that exist in law. These are classic pliability rules, zero order pliability rules, simultaneous pliability rules, loperty rules, title shifting pliability rules and multiple stage pliability rules. This chapter will specifically focus on classic pliability rules because it is more relevant to the legal principles regulating the relocation of a specified servitude of right of way. See Bell A & Parchomovsky G "Pliability rules" (2002) 101 *Mich LR* 1-79 at 30. For further reading see Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 17-18 where the six prototypes of pliability rules are discussed. Due to space constraints, this chapter will only focus on "classic pliability rules" because "classic pliability rules" appropriately illustrate the flexible legal approach as adopted by the court in *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA).
[199] Bell A & Parchomovsky G "Pliability rules" (2002) 101 *Mich LR* 1-79 at 31.
[200] Bell A & Parchomovsky G "Pliability rules" (2002) 101 *Mich LR* 1-79 at 31.

property rule that provides the "baseline protection" of the entitlement.[201] This property rule then defines a "triggering event that alters the protection from property to liability rule".[202] When defining the triggering event that alters protection from property to liability rules, the classic pliability rule retains the advantages of baseline property rule protection, while at the same time it creates the flexibility to adapt to changing circumstances.[203]

The flexible legal approach pertaining to the unilateral relocation of a specified servitude of right of way can be regarded as a classic pliability rule,[204] because the flexible legal approach as applied in *Linvestment* takes an important entitlement associated with a servitude; namely the right of the holder to maintain and exercise the servitude in the same place;[205] and strives to transform its measure of protection by adopting a liability rule standard.[206] The flexible legal approach seeks to shift the way courts think about the relocation of servitudes in the direction of liability rules.[207] Lovett[208] argues that this shift is worthwhile because it assists courts and the contracting parties to understand servitudes as evolving relationships between parties who have concurrent interests in the same land and not merely as inflexible property rights.

According to Bell and Parchomovsky, pliability rules allow rule and policy makers "to foresee changed circumstances and to incorporate them into a legal rule by identifying the change as the trigger that shifts protection modes".[209] Pliability rules are flexible because

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[201] The traditional common law position pertaining to the unilateral relocation of a specified servitude of right of way, namely that the owner of the servient tenement could only relocate a servitude if mutual consent be obtained from the owner of the dominant tenement, is an example of a property rule.
[202] Bell A & Parchomovsky G "Pliability rules" (2002) 101 *Mich LR* 1-79 at 31-32; Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 5.
[203] Bell A & Parchomovsky G "Pliability rules" (2002)101 *Mich LR* 1-79 at 32.
[204] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 5-6.
[205] A right that was protected by a static, crystalline property rule.
[206] The liability rule standard states that an existing servitude of right of way may be altered, provided that the servient owner will be materially inconvenienced in the use of his property if the status *quo* is maintained, the relocation will not prejudice the owner of the dominant tenement and the servient owner pays all costs incurred in the relocation of the servitude. *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 35.
[207] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 77.
[208] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 77.
[209] Bell A & Parchomovsky G "Pliability rules" (2002)101 *Mich LR* 1-79 at 67. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 18.

they allow policy makers to avoid the consequence of either a static property or liability rule regime.[210] Pliability rules are regarded as more attractive rule models, especially in cases where a policy maker aims to achieve a balance of "incompatible interests" such as the concerns of efficiency and justice.[211]

According to Lovett,[212] the flexible legal approach as a classic pliability rule is an improvement to the static property rule protection provided by the traditional common law rule since it leads to fairness and efficiency.

5.4.3 Refinement of the flexible legal approach

Critics of the flexible legal approach and liability rules argue that a sudden change from a property rule to a liability rule has the potential to destabilise property rights, discourage investment, upset settled expectations and undermine the ability of individual property owners to resist forced sales.[213] Some may argue that the dominant owner may appear to be selfish by refusing to cooperate with the owner of the servient tenement.[214] However, there are strong reasons for respecting the rights and interests of the owner who refuses to cooperate with the servient owner.[215] If the dominant owner possesses a property interest after all and if the dominant owner's right to hold out, is an aspect of the right to hold property, then the neighbour's holdout is perfectly legitimate.[216] As a result of the potential of the flexible legal approach to undermine the long-term staying power that

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[210] Bell A & Parchomovsky G "Pliability rules" (2002) 101 *Mich LR* 1-79 at 67. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 18.
[211] Bell A & Parchomovsky G "Pliability rules" (2002) 101 *Mich LR* 1-79 at 67-68. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 19.
[212] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 6.
[213] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 47-48.
[214] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 48.
[215] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of property: Servitudes" (2005) 38 *Conn LR* 1-77 at 48.
[216] See Rose C "Servitudes, security and assent: Some comments on Professors French and Reichman" (1982) 55 *SCA LR* 1403-1416 at 1412; Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 48.

developers, purchasers and investors look for in a servitude, Rose[217] fears that the flexible legal approach could introduce uncertainty into servitude transactions and discourage the land development that servitudes are intended to secure. Rose[218] proposes a very clear approach to address the problem of servitude obsolescence. She proposes that the duration of servitudes should be limited to a fixed period of time. Rose[219] states that the fixed period of time should ideally be chosen by the original parties themselves or chosen by the legislature according to the type of development purpose the servitude serves. Once the fixed period has terminated, the servitutal contract should be open for renegotiation.[220] Dunham's alternative remedy for the relocation of servitudes is similar to the solution provided by Rose.[221] Dunham proposes a temporal "limit on the duration of restrictions, calculated from the time of recordation" or a buy-out mechanism supervised by a court, in terms of which a servient owner would have the right to purchase a release of the servitude restriction from the dominant estate at a judicially determined fair price (a sum equal to the loss suffered by reason of the release).[222] Reichman[223] asserts that servitudes are efficient upon creation and that the right should be enforced. If the contracting parties rights are protected it will encourage utilisation of private planning.[224] A servitude's utility may fluctuate or even diminish as time passes and changes in patterns of

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[217] Rose C "Servitudes, security and assent: Some comments on Professors French and Reichman" (1982) 55 *SCA LR* 1403-1416 at 1413. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 50.

[218] Rose C "Servitudes, security and assent: Some comments on Professors French and Reichman" (1982) 55 *SCA LR* 1403-1416 at 1414.

[219] Rose C "Servitudes, security and assent: Some comments on Professors French and Reichman" (1982) 55 *SCA LR* 1403-1416 at 1413-1414. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 50.

[220] Rose C "Servitudes, security and assent: Some comments on Professors French and Reichman" (1982) 55 *SCA LR* 1403-1416 at 1413-1414.

[221] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 51.

[222] Dunham A "Statutory reformation of land obligations" (1982) 55 *SCA LR* 1345-1352 at 1352. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 51.

[223] Reich U "Toward a unified concept of servitudes" (1982) 55 *SCA LR* 1177-1260 at 1256; Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 52.

[224] Reich U "Toward a unified concept of servitudes" (1982) 55 *SCA LR* 1177-1260 at 1256; Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 52.

land uses and technological developments occur.[225] As a result of this, judicial ingenuity is necessary in structuring remedies.[226]

Even though Lovett[227] is in favour of the flexible legal approach, he states that too much will be left unexplored if one declares that the flexible legal approach constitutes an improvement to the traditional common law position. He submits that the efficiency and fairness of the flexible legal approach pertaining to the relocation of servitudes could be further improved and strengthened.[228] Lovett[229] proposes three pliability rule refinements to the flexible legal approach. Lovett[230] borrowed his insights regarding the refinement of the flexible legal approach from the views of the abovementioned legal scholars. First, he states that the flexible legal approach could be improved by creating a two-step triggering mechanism which can be used to strengthen the property rule protection phase of the pliability rule.[231] This two-step triggering mechanism is formulated by establishing a definite time period during which the location of the servitude cannot be altered without obtaining the necessary consent from the owner of the dominant tenement.[232] Lovett[233] states that if servitudes were allowed a duration of twenty years, it would reduce the risk and economic cost of obsolescence and the transaction costs involved in attempting to obtain the release of an obsolete servitude. According to Lovett,[234] this improvement would respond to the efficiency-oriented criticisms of the flexible legal approach, because if the

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[225] Reich U "Toward a unified concept of servitudes" (1982) 55 *SCA LR* 1177-1260 at 1256; Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 52.

[226] Reich U "Toward a unified concept of servitudes" (1982) 55 *SCA LR* 1177-1260 at 1256; Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 52.

[227] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 6.

[228] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 6.

[229] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 6-9, 43-72.

[230] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 52.

[231] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 6.

[232] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 6.

[233] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 50.

[234] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 6.

property rule protects the dominant owner's entitlement for a defined period of time, it provides the dominant owners with a measure of certainty and predictability.[235]

Lovett's[236] second proposed improvement to the flexible legal approach includes two elements. He advocates that after the expiry of the period during which the relocation of a servitude is prohibited, the location of a servitude should only be changed without the dominant owner's consent if the servient owner obtains a declaration from a court in terms of which the utility and fairness criteria of the flexible legal approach have been met.[237] This will include instances where the servient owner will be materially inconvenienced in the use of his property if the status *quo* is maintained, the relocation will not prejudice the owner of the dominant tenement and that the servient owner pays all costs incurred for the relocation of the servitude.[238] According to Lovett,[239] the arbiter need not be a typical court. The requirement of judicial or quasi-judicial authorisation for the relocation of servitudes is a response to the concerns raised by Orth.[240] Orth[241] is not in favour of the flexible legal approach because the flexible legal approach does not require of the servient owner to obtain judicial authorisation in advance before relocating the servitude. It appears as if the flexible legal approach authorises a servient owner to make a unilateral decision that the advantages of the relocation of the servitude outweigh the servitude holder's interests in maintaining the original location of the servitude.[242]

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[235] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 6.
[236] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 7.
[237] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 7.
[238] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 35.
[239] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 7.
[240] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 56. See Orth JV "Relocating easements: A response to Professor French" (2004) 38 *Real Prop Prob & Tr J* 643-653 at 648,650.
[241] Orth JV "Relocating easements: A response to Professor French" (2004) 38 *Real Prop Prob & Tr J* 643-654 at 648, 650. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 56.
[242] Orth JV "Relocating easements: A response to Professor French" (2004) 38 *Real Prop Prob & Tr J* 643-654 at 648, 650. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 56.

In response to Orth's concern, some courts interpreting the Louisiana Civil Code as well as decisions adopting The Third Restatement of Property (Servitudes) (*Restatement*)[243] in the US have focused on the necessity of requiring judicial authorisation before relocation of servitudes can take place. In the first reported servitude relocation judgment in Louisiana, *Hotard v Perrilloux*[244] (*Hotard*) the court dismissed the servient owner's claim to relocate the servitude because he had sought to relocate the servitude arbitrarily without obtaining judicial authorisation. Louisiana's law of servitudes is derived largely from the French Civil Code, namely the *Code Napoléon*, whose servitude provisions are indebted to Roman law.[245] The court in *Hotard* cited French writers from the 19th century interpreting article 701 of the French Civil Code in support of the conclusion that judicial authorisation was required before relocation of a servitude could take place.[246] In *Denegre v Louisiana Public Service Commission*[247] the court stated that a servient owner seeking to relocate a right of way should be able to "secure a judicial adjudication" under article 777 of the Louisiana Civil Code. The importance of obtaining judicial authorisation before relocating a servitude was also reiterated in *Discon v Sara Inc*.[248]

The third pliability rule improvement that could be attached to the flexible legal approach would grant the court the discretion to award compensatory damages.[249] Lovett[250] asserts that he designed this refinement to bring more efficiency and fairness to the relocation of servitudes and modification decisions. Furthermore, Lovett[251] states that this third pliability rule refinement responds to the criticism that liability rules may discourage individuals from

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[243] American Law Institute *Restatement of the Law – Property Restatement (Third) of Property: Servitudes* § 4.8 (2000) *Location, Relocation, and Dimensions of a Servitude*.
[244] 8 La App 476 (1928) WL 3837 (La App Orleans). See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 56.
[245] Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 355. See discussion of US law in chapter 3.
[246] *Hotard v Perrilloux* 8 La App 476 (1928) WL 3837 (La App Orleans) 477-478.
[247] *Denegre v Louisiana Public Service Commission* 257 La 503, 242 So 2d 832 (1979) 838. See Lovett JA "A Bend in the Road: Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 57.
[248] 265 So 2d 765 (La 1972). See discussion of *Brian v Bowlus* 399 So 2d 545 (La 1981) in Chapter 4 section 4.2.4.
[249] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 7.
[250] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 7.
[251] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 7.

learning how to bargain with each other. In addition, Lovett asserts that if a servient owner complies with all the requirements of the flexible legal approach and the court awards no damages, then the servient owner will capture the entire gain of the transaction without having to share it with the dominant owner, which might not have happened if the parties had settled the dispute themselves by means of bargaining.[252] Lovett[253] refers to *Ogden v Bankston* (*Ogden*)[254] to illustrate the unfairness of the flexible legal approach in allowing the owner of a servient tenement to capture all the surplus value of servitude relocation. In the *Ogden* case, the plaintiff was the owner of the dominant tenement. The defendant was the owner of the servient tenement. A servitude was registered over the defendant's property. The servient owners desired to subdivide and market their property as a residential neighbourhood and contend that the present location of the servitude interfered with their plans to develop and sell the property. The dominant owner sought a preliminary and permanent injunction against the servient owner to prevent the servient owner from interfering with the dominant owner's property as well as a claim for damages. The servient owner sought a declaratory order to relocate the servitude. The District Court decided the case in favour of the owner of the dominant tenement and granted a permanent injunction which prohibited the owner of the servient tenement from any further interference with the servitude.[255] The servient owner did not succeed with his claim because he failed to prove that the present site of the right of passage had become burdensome.[256] The Court of Appeal affirmed the decision of the trial court.[257] The Court of Appeal held that the servient owner did not have a contractual right to relocate the servitude.[258] Furthermore, the court held that the right of relocation under the provision of the Louisiana Civil Code could not be claimed because the servient owner could not establish that the continued existence of the servitude had become burdensome in its present location.[259] The Supreme Court of Appeal stated that the Court of Appeal was

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[252] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 64.
[253] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 64.
[254] 398 So 2d 1037 (La 1981).
[255] *Ogden v Bankston* 398 So 2d 1037 (La 1981) 1039.
[256] *Ogden v Bankston* 398 So 2d 1037 (La 1981) 1039.
[257] *Ogden v Bankston* 398 So 2d 1037 (La 1981) 1039.
[258] *Ogden v Bankston* 398 So 2d 1037 (La 1981) 1039.
[259] *Ogden v Bankston* 398 So 2d 1037 (La 1981) 1039.

correct in determining that once a praedial servitude was established by contract, the servient owner may not superimpose relocation rights over property sold without being subject to a right of relocation.[260]

The court considered whether the servient owners' legal rights under article 777 of the 1870 Louisiana Civil Code (the predecessor of the current Article 748) justified the proposed location. The court held that the critical question in this case was to determine whether it has been shown that the current location of the servitude "has become more burdensome" to the current owner of the servient tenement.[261] The court recognised the conflicting policies supporting each party's position.[262] Dixon CJ noted that the right of a servient owner to relocate a servitude was founded on the civilian principle that "praedial servitudes are restraints on the free disposal and use of property, and are not, on that account, entitled to be viewed with favour by the law".[263] On the other hand, Dixon CJ acknowledged that a servitude is a bargained for convenience that is established by means of a contract between the servient and dominant owners.[264] The court noted that the general principle established in the law is that the servient owner can do nothing to diminish the use or convenience of the servitude.[265]

Furthermore, Dixon CJ noted that the servient owner failed to prove that the current location was more burdensome now than what it was originally.[266] The servient owner also failed to prove that the current location of the servitude prevented him from making any useful improvement.[267] The court pointed out that the servient owner's claim for relocation was based on the assertion that the present location of the roadway might hinder the servient owner from increasing his profits on the sale of the land.[268] The court seemed

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[260] *Ogden v Bankston* 398 So 2d 1037 (La 1981) 1041.
[261] *Ogden v Bankston* 398 So 2d 1037 (La 1981) 1044.
[262] See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 64.
[263] *Ogden v Bankston* 398 So 2d 1037 (La 1981) 1043. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 64.
[264] *Ogden v Bankston* 398 So 2d 1037 (La 1981) 1043.
[265] *Ogden v Bankston* 398 So 2d 1037 (La 1981) 1043.
[266] *Ogden v Bankston* 398 So 2d 1037 (La 1981) 1043.
[267] *Ogden v Bankston* 398 So 2d 1037 (La 1981) 1043.
[268] *Ogden v Bankston* 398 So 2d 1037 (La 1981) 1043. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 65.

sceptical about such a slim basis for relocation and observed that one distinct disadvantage of the present location of the servitude that might satisfy the "more burdensome" requirement under Article 777 was that it prevents lots in the proposed subdivision from having a full depth of about 150 feet.[269] These lots would be less desirable because the original location of the servitude would diminish their depth below that figure.[270] The court stated that it was doubtful that when the servitude was initially created, the servient owner contemplated the use of his property as a suburban neighbourhood.[271] The potential for land development only arose once circumstances changed.[272] Lovett states that the abovementioned statement is remarkable because of the implication that the court will do something about it.[273] Despite the court's unwillingness to act to alleviate the servient owner's "personal inconvenience", the court held that the servient owner ought to be "entitled to relocate the servitude where it diminishes the depth of the lots in the proposed subdivision below the figure required for the most advantageous use of the property".[274] In conclusion, the court authorised the relocation of the servitude by remanding the case to the trial court in order for the trial court to reconsider the proposed relocation within its new parameters.[275] The court held that the burden created by the servitude should be measured by the servient owner's reduced profit margin in his aim to resell the subdivided lots.[276]

As Lovett[277] rightfully mentions, the "social utility maximising considerations" that have been taken into consideration to justify the relocation rule was reduced to nothing more

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[269] *Ogden v Bankston* 398 So 2d 1037 (La 1981) 1044. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 65.
[270] *Ogden v Bankston* 398 So 2d 1037 (La 1981) 1044.
[271] *Ogden v Bankston* 398 So 2d 1037 (La 1981) 1044.
[272] *Ogden v Bankston* 398 So 2d 1037 (La 1981) 1044.
[273] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 65.
[274] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 65-66; *Ogden v Bankston* 398 So 2d 1037 (La 1981) 1044.
[275] *Ogden v Bankston* 398 So 2d 1037 (La 1981) 1044; Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 66.
[276] *Ogden v Bankston* 398 So 2d 1037 (La 1981) 1044. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 66.
[277] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 66.

than a developer's reduced profit margin. Lovett[278] asserts that the servitude in the *Ogden* case that was situated along a rustic, tree-lined, mile-long road, might have provided the dominant owner with recreational or picturesque benefits that a market analyst might overlook. Lovett[279] argues that despite the interests of the dominant owner, the courts still allowed the relocation of a servitude as long as an alternative route could be granted that was equally convenient to the dominant owner. Lovett uses the abovementioned example to illustrate the tendency of liability rules to undervalue or to ignore the subjective values that property owners attach to the things they possess.[280]

A question that arises is how decision makers can further improve the flexible legal approach in order to prevent it from becoming "a vehicle for one private individual to capture all of the economic gain of a non-consensual transaction".[281] According to Lovett, the possible answer to this question is to give courts the power to award a premium or bonus compensation.[282] Lovett refers to the *Mill Acts*.[283] These statutes authorised a private riparian owner to erect a dam "which backed up the water behind it in order to create a 'head' for the operation of a mill"[284] that would create a public benefit while at the same time limiting the remedies of upstream land owners whose property was flooded to monetary damages rather than injunctive relief.[285] As Lovett[286] states, the *Mill Acts*[287]

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[278] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 66.
[279] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 66.
[280] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 66.
[281] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 67.
[282] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 67.
[283] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 67; citing Epstein RA *Takings: Private Property and the Power of Eminent Domain* (1985) 170-175.
[284]Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 67; citing Epstein RA *Takings: Private Property and the Power of Eminent Domain* (1985) 170.
[285] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 67.
[286] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 67.
[287] See *Head v Amoskeag Mfg Co* 113 US 9, 5 S Ct 441 (1885) 20. This case describes the New Hampshire's Mill Act. This Act originated in colonial legislation and emerged as a general statute in 1868. See footnote 354 in Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 67.

created a pliability rule because it takes away the upstream property owner's traditional right to enjoin the flooding nuisance and substitutes damages as the only remedy. Additionally, Lovett[288] asserts that the following two limitations were essential to the effective operation of this pliability rule. In the first instance, the law required the downstream user to obtain prior governmental authorisation before he could obtain protection under the Mills Acts.[289] The purpose of the abovementioned requirement was to ensure that the scope of the dam was appropriate and to ensure that a public benefit would result from the forced exchange of property rights.[290] Secondly, "the upstream owner was awarded premium compensation, typically 150% of the fair market value of the lost property".[291] The premium compensation regime assured that the surplus created by a forced exchange was divided evenly.[292]

According to Bell and Parchomovsky, another advantage relating to the premium compensation scheme is that when a privileged taking deprives the owner of the property of his or her entitlement, the scheme provides meaningful compensation.[293] However, Lovett notes that the need for premium compensation from Bell and Parchomovsky's perspective diminishes the need for compensation in the case of the flexible legal approach pertaining to the unilateral relocation of servitudes, because the flexible legal approach does not completely deprive the servitude holder of his entitlement.[294] The aim of the criteria contained in the flexible legal approach, namely that an existing servitude of right of way may only be altered provided that the servient owner will be materially

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[288] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 67.
[289] Epstein RA "A clear view of the cathedral: The dominance of property rules" (1997) 106 *Yale LJ* 2091-2120 at 2114. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 67.
[290] Epstein RA "A clear view of the cathedral: The dominance of property rules" (1997) 106 *Yale LJ* 2091-2120 at 2114. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 67.
[291] *Head v Amoskeag Mfg Co* 113 US 9, 5 S Ct 441 (1885). See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 68.
[292] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 68.
[293] Bell A & Parchomovsky G "Pliability rules" (2002) 101 *Mich LR* 1-79 at 52; Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 68.
[294] Bell A & Parchomovsky G "Pliability rules" (2002) 101 *Mich LR* 1-79 at 52; Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 68.

inconvenienced in the use of his property if the status *quo* is maintained, that the relocation will not prejudice the owner of the dominant tenement, and that the servient owner pays all costs incurred in the relocation of the servitude,[295] diminishes the need for premium compensation.[296] In the US Supreme Court decision of *Head v Amoskeag Manufacturing Co*[297] the court reiterated the justification for a refined pliability rule approach in the easement location setting:[298]

> "When property, in which several persons have a common interest cannot be fully enjoyed in its existing condition, the law usually provides a way in which they may compel one another to submit to measures necessary to secure its beneficial enjoyment, making equitable compensation to any whose control in the property is thereby modified."[299]

Lovett[300] refers to *Winingder v Balmer*[301] to illustrate a premium compensation award in a context that is similar to the relocation of servitudes. Winingder lived in a house built over eighty years ago. The house was located on the common property line of the property belonging to Balmer. At the time when Winingder purchased the house, there was no fence along the common property line, except the remains of a broken down chain link structure. When Balmer purchased the property on the land adjacent to Winingder's property, she was aware of the fact that Winingder's home encroached on the common property line. Maintenance work was performed at Winingder's home. The maintenance workers used the access through the Balmer property, with Balmer's knowledge and without complaint. Winingder's husband initiated negotiations with Balmer. They sought to achieve an acceptable plan for the development of Balmer's property, or in the alternative they sought to purchase a strip of the property along the common boundary line, but the negotiations were unsuccessful. Balmer erected a fence running the length of the common

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[295] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 35.
[296] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 68.
[297] 113 US (1885) 9, 21. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 68.
[298] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 68.
[299] *Head v Amoskeag Mfg Co* 113 US 9, 5 S Ct 441 (1885) 21.
[300] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 69.
[301] 632 So 2d 408 (La Ct App 1994).

property line. The fence that was erected by Balmer blocked off a rear window and a side window of Winingder's home. It also blocked access to Winingder's utilities, hot water heaters and air conditioning units. The trial court applied article 670 of the Louisiana Civil Code to solve the dispute.[302] The trial court granted a legal servitude in favour of the Winingder estate.[303] The court required Winingder to pay Balmer the value of the servitude and the cost of moving the fence and gate erected by Balmer.[304] The trial court resolved the case by applying Article 670 of the Louisiana Civil Code.[305] Article 670 provides a classic pliability solution to the dispute because it allows a court to grant the owner of an encroaching building a praedial servitude to maintain his building where it stands, provided that the building was constructed in good faith, that the owner did not complain within a reasonable time after the owner knew or should have known of the encroachment and that the encroacher pays compensation for the value of the servitude taken and for the damage that the neighbour has sustained.[306] The court granted the plaintiff a servitude over the defendant's property along the common border line. Furthermore, the court held that Balmer had to remove the fence and awarded the defendant damages as compensation for the servitude.[307]

Lovett[308] states that the court's decision to grant a declaratory order for the payment of compensation implies recognition that forced transfers of private property interests will at times necessitate additional measures of compensation where strong personal and subjective interests are at stake. Lovett[309] is correct in stating that several goals will be accomplished when courts are given the power to award some premium compensation in situations where the relocation of a servitude is required. One of these goals is that it will most probably provide incentives to servient owners to bargain on how the servitude ought to be relocated rather than risking the possibility of being subjected to a compensation

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[302] *Winingder v Balmer* 632 So 2d 408 (La Ct App 1994) 412.
[303] *Winingder v Balmer* 632 So 2d 408 (La Ct App 1994) 412.
[304] *Winingder v Balmer* 632 So 2d 408 (La Ct App 1994) 412.
[305] Louisiana Civil Code (1980).
[306] *Winingder v Balmer* 632 So 2d 408 (La Ct App 1994) 412. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 69-70.
[307] *Winingder v Balmer* 632 So 2d 408 (La Ct App 1994) 409-410, 413.
[308] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 70.
[309] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 70.

penalty.[310] It would also give servitude holders protection against servient owners who are reluctant to share the expected net surplus to be gained by the relocation of the servitude.[311] In addition, the third refinement of the flexible legal approach could also help compensate the dominant owner for the loss of any subjective values associated with servitutal rights.[312]

5.5 Conclusion

The aim of this chapter was to evaluate whether it is justifiable for courts to overturn a long established precedent relating to servitudes based on the grounds of convenience and equity. This chapter investigated whether the *Linvestment* court's reasons for reaching its decision are sufficient and convincing. The main issue that the chapter aimed to address was to determine the correct legal approach, namely to adhere to the traditional common law rule which prohibits the unilateral relocation of the servitude by the owner of the servient tenement unless consent has been obtained from the owner of the dominant tenement; or the flexible legal approach that allows the unilateral relocation of a servitude. It also aimed to illustrate how the flexible legal approach can be improved in order to strike a balance between the interests of the different parties to the servitutal contract.

In this chapter, the general arguments in favour of and the criticism against the traditional common law and the flexible legal approach have been evaluated. The traditional common law position is preferred by some academics because the traditional common law promotes certainty in landownership. Furthermore, it is assumed that when a servitude is created, the grantor grants the right to the dominant owner to use his property, including the assurance of the permanent localisation of the servitude. The traditional common law rule balances the restrictions placed on both parties to the servitutal relationship. The final

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[310] Lovett JA refers to footnote 72 in Krier JE & Schwab SJ "Property rules and liability rules: The cathedral in another light" (1995) 70 *NYU LR* 440-483 at 465; Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 70.
[311] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 70.
[312] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 70.

argument in favour of the traditional common law position is that a servitude is nothing less than a fixed and judicially unchangeable property right.

Some academics prefer the flexible legal approach because it does not put the servient owner at the mercy of the owner of the dominant tenement.[313] The servient owner can relocate only if the dominant owner suffers no damage.[314] In terms of the traditional common law approach, the dominant owner can demand and in theory expect to get almost all the surplus value created by any relocation, while if the development made possible by relocation of the servitude increases the value of the servient tenement, the owner of the servient tenement will be better off by the amount of that increase.[315] French[316] argues that the flexible legal rules are designed to accommodate the interests of both the servient owners and dominant owners and to allow each of the owners to maximize the utility of his or her property without damaging the other. [317]

As an alternative, law and economics theory was utilised as a guideline to determine when the traditional common law approach and when the flexible legal approach ought to be applied by policy makers. Calabresi and Melamed's property and liability rule paradigm is one of the paradigms used to frame the debate about the relocation of servitudes. This paradigm illustrates how entitlements can be protected by property and liability rules. Furthermore, it also illustrates when policy makers should apply property and liability rules to protect entitlements. The trade-off suggests that property rules[318] should be the preferred remedy when transaction costs are low, because they facilitate mutually beneficial bargaining between private parties.[319] By contrast, liability rules should be

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[313] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 10.
[314] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 10.
[315] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 10.
[316] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 11.
[317] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 11-12.
[318] The traditional common law rule regarding the unilateral relocation of a specified servitude of right of way can be classified as a pure property rule.
[319] Miceli TJ "Property" in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 at 249. See Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710.

preferred when transaction costs are high because liability rules[320] allow the court to coerce exchanges when bargaining is not possible.[321] However, there are risks involved when a legal system switches from property to liability rule protection.[322] One of the risks that arise is that liability rules may create an undervaluation of entitlements in cases where entitlement holders are sentimentally attached to their entitlements.[323]

Thereafter, Bell and Parchomovsky's pliability rule paradigm was discussed. Their pliability paradigm provides insight as to what the structure of the legal rule regarding the relocation of servitudes should look like in order for the rule to strike a balance in the rights of both the dominant and servient owner. The flexible legal approach pertaining to the unilateral relocation of a specified servitude of right of way can be regarded as a classic pliability rule.[324] It is clear from the insights of Bell and Parchomovsky's that when a legal rule such as the flexible legal approach is structured in accordance with the pliability paradigm, it has the effect of fully capturing the protection of entitlements in the legal system.[325] Pliability rules protect legal entitlements where the protection of entitlements can shift between property and liability rules as long as some requirements have been met. Pliability rules can be regarded as dynamic in nature, while property and liability rules can be regarded as static.

If the normative reasons used to justify the application of a pliability rule paradigm are taken into consideration, then the inference may be drawn that the grounds on which the court in *Linvestment CC v Hammersley*[326] based its judgment, namely fairness, justice and equity, are to a certain extent credible, since the law cannot remain rigid and needs to be continually changed in order to meet changing conditions. This judgment is also sensible from a practical point of view. Lovett is correct when he states that the flexible legal

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[320] The flexible legal approach can be classified as a liability rule.
[321] Miceli TJ "Property" in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 at 249.
[322] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 15-16.
[323] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 15. See Calabresi G & Melamed AD "Property rules, liability rules and inalienability: One view of the cathedral" (1972) 85 *Harv LR* 1089-1128 at 1108.
[324] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 5.
[325] Bell A & Parchomovsky G "Pliability rules" (2002) 101 *Mich LR* 1-79 at 5.
[326] [2008] 2 All SA 493 (SCA).

approach is pragmatic because it helps courts to understand servitudes as evolving relationships between parties with concurrent interests in the same land and not merely as inflexible property rights.[327]

However, there is room for improvement. The flexible legal approach can be and should be refined in its implementation in the direction of a well-defined pliability rule consistent with the vision of Bell and Parchomovsky. Lovett[328] proposed three pliability rule refinements to the flexible legal approach. First, he states that the flexible legal approach should be improved by creating a two-step triggering mechanism which can be used to strengthen the property rule protection phase of the pliability rule.[329] This two-step triggering mechanism will be formulated by establishing a definite time period during which the location of the servitude cannot be altered without obtaining the necessary consent from the owner of the dominant tenement.[330] According to Lovett,[331] this improvement would respond to the efficiency-oriented criticisms of the flexible legal approach, because if the property rule protects the dominant owner's entitlement for a defined period of time, then it provides the dominant owners with a measure of certainty and predictability.[332] Lovett's[333] second proposed improvement to the flexible legal approach includes two elements. According to Lovett, once the period during which the relocation of a servitude is prohibited expires, the location of a servitude should only be changed without the dominant owner's consent if the servient owner obtains a declaration from a court that states that the utility and fairness criteria of the flexible legal approach have been met.[334] The third pliability rule improvement that could be attached to the flexible legal approach

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[327] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 77.
[328] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 6-9, 43-72.
[329] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 6.
[330] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 6.
[331] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 6.
[332] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 6.
[333] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 7.
[334] See *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 35.

would grant the court the discretion to award compensatory damages.[335] According to Lovett,[336] he designed this refinement to bring more efficiency and fairness to the relocation of servitudes and modification decisions. Furthermore, Lovett[337] states that this third pliability rule refinement responds to the critique that liability rules may discourage individuals from learning how to bargain with each other. In addition, Lovett submits that if a servient owner complies with all the requirements of the flexible legal approach and the court awards no damages, then the servient owner will capture the entire gain from the transaction without having to share it with the dominant owner, which might not have happened if the parties settled the dispute by themselves by means of bargaining.[338]

The three refinements that Lovett proposes to improve the flexible legal approach relating to the relocation of servitudes are definitely viable. If his three refinements are embedded in the legislative or judicial rules regulating the relocation of servitudes, then the new rule will certainly become a leading example of the value of pliability rule modelling as a mode for entitlement protection design.[339]

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[335] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 7.
[336] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 7.
[337] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 7.
[338] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 64.
[339] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 77.

Chapter 6: Conclusion

6.1 Introduction

In *Linvestment CC v Hammersley*[1] (*Linvestment*), the court referred to historical and policy considerations and relied on comparative law to reach the conclusion that even specified servitudes of right of way may be relocated unilaterally, against the wishes of the owner of the dominant property, if it is in the interest of fairness, equity and justice.

The aim of this thesis was to investigate whether the methodology used and the reasons provided by the court in *Linvestment* to reach its conclusion, namely that unilateral relocation of a specified servitude of right of way is possible in South African law, are convincing and sufficient. The point of departure was that the *Linvestment* judgment changed the common law on the basis of insubstantial historical and comparative argument, although the policy reasons for the decision are more convincing.[2] This thesis begins with a discussion of the *Linvestment* case in view of the traditional legal position regarding the relocation of a specified servitude and then proceeds to a comparative study, a constitutional analysis and a policy analysis. This conclusion is a discussion of the main findings on the legal issue pertaining to the unilateral relocation of a specified servitude of right of way.

6.2 Linvestment CC v Hammersley and South African law

The aim of chapter 2 was to discuss the traditional legal position regarding the unilateral relocation of a specified servitude of right of way as it was applied in South African law, prior to the decision in *Linvestment*. The traditional legal principle regarding the relocation of servitudes as stated in *Gardens Estate Ltd v Lewis*[3] was that a specified or definite servitude could only be relocated by mutual consent between the parties to the contract constituting the servitude. Chapter 2 illustrates how the court in *Linvestment* overturned this long-established precedent relating to servitudes based on the grounds of

[1] [2008] 2 All SA 493 (SCA).
[2] See Chapter 1 section 1.1.
[3] 1920 AD 144.

convenience and equity. Since the *Linvestment* judgment, the legal position regarding the unilateral relocation of a specified servitude of right of way is that the location of a specified servitude of right of way may be altered unilaterally by the owner of the servient tenement. This unilateral relocation requires that the servient owner will be materially inconvenienced in the use of his property if the status *quo* is maintained, that the relocation will not prejudice the owner of the dominant tenement and that the servient owner pays all costs incurred in the relocation of the servitude.[4]

Chapter 2 briefly analyses the legal historical arguments that the court in *Linvestment* relied on to justify its departure from the common law. The court in *Linvestment* relied on the 1816 draft code of law by Professor JM Kemper to justify its departure from the common law rule.[5] The legal historical arguments provided to justify the conclusion that a specified servitude of right of way may be relocated unilaterally are problematic. Firstly, Heher AJ should not have relied on the 1816 draft civil code of Professor JM Kemper, because it never formed part of the received 17th and 18th century Roman-Dutch law of South Africa. Secondly, the *Code Civil* brought an end to Roman-Dutch law in its country of origin.[6] Therefore, the draft civil code was no longer Roman-Dutch law in the sense that South Africa inherited it because it formed part of the post-Napoleonic development of Dutch law.[7] Thirdly, the draft civil code of Professor JM Kemper was never official law in the Netherlands.[8] Purely on historical grounds there was therefore insufficient reason for the departure from the established position as it was set out in *Gardens Estate Ltd v Lewis*.

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[4] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 35.
[5] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 23.
[6] Hahlo HR & Kahn E *The South African Legal System and its Background* (1968) 564.
[7] "The Dutch *Burgerlijk Wetboek* of 1838, though by no means a copy of it, was substantially modelled on the *Code Civil*": Hahlo HR & Kahn E *The South African Legal System and its Background* (1968) 564.
[8] The draft civil code of 1820 constituted a distillation of pure Roman-Dutch law in its final stage of development. This draft civil code by Kemper was rejected by the legislature, because it was opposed by the Belgian members, who wanted the *Code Civil*: Hahlo HR & Kahn E *The South African Legal System and its Background* (1968) 564.

6.3 Comparative analysis

The court in *Linvestment*[9] further justified its departure from earlier precedent with reference to the international tendency to follow a more flexible legal approach. The problem with the methodology of this decision is that the court used secondary sources to support its comparative argument. This was done without any discussion of their comparative value or context.[10] In the absence of more detailed and contextual information it is difficult to assess the weight of the comparative sources referred to in the decision. Unlike the *Linvestment* judgment, chapter 3 aimed at providing a more contextual comparative analysis of the Dutch, German, US, Scots and English legal position pertaining to the unilateral relocation of a specified servitude of right of way. The purpose of the comparative section is above all to ascertain why and how the foreign jurisdictions referred to either retained or abolished the stricter approach to unilateral relocation of a specified servitude of right of way.

Dutch and German law as well as some states in the US illustrate the widespread practice that favours a flexible approach to the relocation of servitudes. In Dutch law, the owner of the servient tenement may relocate a servitude unilaterally, provided that the relocation is reasonable and that the relocation of the servitude will not diminish the right of the owner of the dominant tenement.[11] A declaratory order should be obtained from the court, as soon as a dispute regarding the reasonableness of the relocation of a servitude arise.[12] The court will only modify the location of a servitude once the owner of the servient tenement complies with the fairness criteria of the flexible legal approach[13] and if the

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[9] [2008] 2 All SA 493 (SCA).

[10] The court referred to the *Ontwerp* of Professor Meijers. Furthermore, the court referred briefly to the Belgian Civil Code and the German Civil Code as well as the discussion of the Scots law by Cuisine and Paisley. *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 28-29; Meijers EM (1955) *Ontwerp voor een Nieuw Burgerlijk Wetboek 2 Toelichting* (Book 5) at 428. See footnote 32 in *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 27. Professor Meijers stated that the unilateral relocation of a specified servitude of right of way is recognised by many foreign codes, including Switzerland, Italy and Greece, provided that the servient owner proves that the dominant owner's servitutal rights will not be reduced. This research did not focus on the Italian, Swiss and Greek law due to the language barrier. The jurisdictions that are investigated in this thesis provide sufficient results to enable the conclusion.

[11] BW 5:73 par 2. See Warendorf H, Thomas R & Curry-Sumner I "Book 5 Title 6 Easements" in *The Civil Code of the Netherlands* (2009) 599-640 at 615. Rb 's Gravenhage 25 November 1999, KG 2000, 2.

[12] See Mijnssen FHJ, Bartels SE & Van Velten AA *Mr C Assers Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht* vol 5 *Zakenrecht Eigendom en Beperkte Rechten* (15th ed 2008) 186.

[13] BW 5:78. See Warendorf H, Thomas R & Curry-Sumner I "Book 5 Title 6 Easements" in *The Civil Code of the Netherlands* (2009) 599-640 at 617. See Mijnssen FHJ, Bartels SE & Van Velten AA *Mr C Assers*

existence of the initial route is in conflict with the public interest.[14] If one evaluates the relevant provisions in the Dutch Civil Code, one can draw the inference that the reason why Dutch law applies a flexible approach is to accommodate the owner of the servient tenement in cases where unforeseen circumstances may necessitate the relocation of a servitude.[15]

German law pertaining to the relocation of a specified servitude of right of way is similar to Dutch law in that the owner of the servient tenement may only relocate a servitude if the initial servitude creates more than a mere inconvenience for the servient owner.[16] Furthermore, the German Civil Code states that a right to relocate a servitude cannot be excluded by legal transaction.[17] If one takes the latter requirement of the German Civil Code into consideration, it appears as though the reason for the application of the flexible legal approach is to prevent a rigid legal system in which the owner of the servient tenement is prohibited from relocating a servitude, especially in unforeseen circumstances where it may be unreasonable to expect of the owner of the servient tenement to maintain the servitude unchanged. Servitutal rights cannot be inflexible since it needs to continually meet the changing needs of society.

The US federal law does not have a uniform practice regarding the relocation of a specified servitude of right of way. Some states in the US follow a strict common law approach, while other states follow a flexible approach pertaining to the relocation of a specified servitude of right of way. A strict common law approach is applied in some states of the US on the ground that the owner of the dominant tenement bargained for a fixed

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Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht vol 5 *Zakenrecht Eigendom en Beperkte Rechten* (15th ed 2008) 185.

[14] BW 5:78. See Warendorf H, Thomas R & Curry-Sumner I "Book 5 Title 6 Easements" in *The Civil Code of the Netherlands* (2009) 599-640 at 617.

[15] A servitude will be relocated when circumstances are of such a nature that it cannot be required of the owner of the servient tenement to maintain the servitude unchanged. See BW 5:78. See Warendorf H, Thomas R & Curry-Sumner I "Book 5 Title 6 Easements" in *The Civil Code of the Netherlands* (2009) 599-640 at 617. See Mijnssen FHJ, Bartels SE & Van Velten AA *Mr C Assers Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht* vol 5 *Zakenrecht Eigendom en Beperkte Rechten* (15th ed 2008) 185.

[16] Otto DU "Diensbarkeiten Titel 1: Grunddienstbarkeiten" in Dauner-Lieb B, Heidel T & Ring G (eds) *Nomos Kommentar BGB* vol 3 Ring G, Grziwotz & Keukenschrijver A (eds) *Sachenrecht* (2nd ed 2008) 831-911 at 888.

[17] Forrester IS, Goren SL & Ilgen HM *The German Civil Code* Book 1-5 (as amended to January 1, 1975) Book 3: § 1023 at 169.

location.[18] Therefore, it is important that the owner of the dominant tenement should be consulted prior to relocation, because a unilateral relocation of a servitude may reduce the utility and value of the servitude for the owner of the dominant tenement.[19] Louisiana was one of the first states in the US to permit a flexible approach regarding the relocation of a specified servitude of right of way.[20] The Louisiana rule authorising the unilateral relocation of a specified servitude of right of way was adopted by the American Law Institute's Restatement (Third) of Property (Servitudes) § 4.8 (2000) as the recommended new rule for the relocation of servitudes in US law generally.[21] Even though some states prefer the strict traditional common law approach, some courts in the US began to adopt the flexible legal approach.[22] Numerous arguments are provided to justify the application of the flexible legal approach in the US law.[23] The primary goal of the new rule is to accommodate the owner of the servient estate to develop his property without interfering with the interests of the owner of the dominant tenement.[24] The flexible legal approach decreases the risk that the servient tenement will be unreasonably restricted from future development.[25] In addition, the aim of the flexible legal approach is to strike a balance between the interests of the owner of the dominant tenement and the owner of the servient tenement.[26]

Scots law is less clear regarding the legal position regarding the relocation of a specified servitude of right of way.[27] The legal approach followed in Scots law can be divided into an early common law approach, a later approach and a modern composite approach.[28] The early common law approach was of a flexible nature and authorised the owner of the

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[18] See Chapter 3 section 3.4
[19] See Singer JW *Introduction to Property* (2nd ed 2005) 222. The term "easement owner" refers to the owner of the servient tenement and the term "easement holder" refers to the owner of the dominant tenement.
[20] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 42.
[21] See Restatement (Third) of Property: Servitudes § 4.8(3) (2000). Comment (f) notes that s 4.8(3) "adopts the civil law rule that is in effect in Louisiana and a few other states". This rule was proposed for the first time in a tentative draft of chapter 4 of the Restatement in 1994. See also Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 359.
[22] *Lewis v Young* 705 N E 2d 649 (NY 1998); *Roaring Forks Club v St Jude's Co* 36 P 3d 1229 (Colo 2001).
[23] See Chapter 5.
[24] American Law Institute *Restatement of the Law – Property Restatement (Third) of Property: Servitudes* § 4.8(3) (2000) *Location, Relocation, and Dimensions of a Servitude* (See Comment f to § 4.8(3)).
[25] American Law Institute *Restatement of the Law – Property Restatement (Third) of Property: Servitudes* § 4.8(3) (2000) *Location, Relocation, and Dimensions of a Servitude* (See Comment f to § 4.8(3)).
[26] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1–15.
[27] See Chapter 3 section 3.5.
[28] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) paras 12.37-12.80.

servient tenement to relocate a servitude unilaterally, provided that the alteration did not diminish the interests of the dominant owner.[29] The later approach is based on a stronger preference for contract oriented certainty, namely that once a servitude is determined by a contract, it may not be relocated.[30] A strict contractual approach is applied in situations where the relocation of a specified servitude of right of way would lead to a destabilisation of the owner of the dominant tenement's property rights.[31] However, there are strong arguments in favour of the unilateral relocation of a specified servitude of right of way in Scots law.[32] Cuisine and Paisley state that the later approach should not be taken to suggest that where the servitude is defined in a deed, that evidence of convenience or prejudice, arising from a proposed variation is irrelevant.[33] Even though a strict contract-oriented approach is applied in Scotland, the owner of the servient estate may apply to the Lands Tribunal for the deviation of the servitude.[34] English law regarding the unilateral relocation of servitudes is not as flexible and states that the owner of the servient estate will have no right to alter or deviate from the line once the location of an easement is specified by contract or usage. Alterations may only be allowed if such a right has been

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[29] See § 987 and § 1010 in Bell GJ & Guthrie W *Principles of the Law of Scotland* (10th ed 1899) 407, 412; Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.37. However, the passages in Bankton AM *An Institute of the Laws of Scotland in Civil Rights: With Observations upon the Agreement or Diversity between them and the Laws of England. In Four Books. After the General Method of the Viscount of Stair's Institutions* II vii (1751-1753) 17 and 18 seem to conflict with the passages in Bell GJ & Guthrie W *Principles of the Law of Scotland* (10th ed 1899). According to Cuisine and Paisley, the views of Lord Bankton may be reconciled with Lord Bell's views on the basis that passage 18 indicates that when a servitude which was originally exercisable over an indefinite route has a route assigned to it, that route cannot be altered unilaterally by the servient proprietor without any justifiable cause. According to Cuisine and Paisley, passage 17 may indicate that a justifiable cause for relocating a servitude of right of way is the intention to enclose and labour ground through which it runs. See footnote 33 in Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) 405.

[30] *Hill v Maclaren* (1879) 6 R 1363 at 1366. For a discussion of *Hill v Maclaren* (1879) 6 R 1363 see Lovett JA "A new way: Servitude relocation in Scotland and Louisiana" (2005) 9 *Edin LR* 352-394 at 369.

[31] *Hill v Maclaren* (1879) 6 R 1363 at 1366.

[32] The minority view is expressed in *Hill v Maclaren* (1879) 6 R 1363 at 1368. The minority approach suggests that the owner of the servient estate may seek a declaratory order from the court to have the servitude varied Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.43.

[33] Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.52.

[34] In terms of Part I of the Conveyancing and Feudal Reform (Scotland) Act 1970, the burdened servient owner can apply to the Lands Tribunal for a variation of a servitutal right. The servient owner can apply to the Lands Tribunal even in cases where unilateral relocation at common law is not available. *Munro v McClintock* 1996 SLT (Sh Ct) 97 at 101. See Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.76. The right of the servient owner to have resort to the Conveyancing and Feudal Reform (Scotland) Act 1970 cannot be restricted or excluded by an agreement. S 7 of the Conveyancing and Feudal Reform (Scotland) Act 1970. See Cuisine DJ & Paisley RRM *Servitudes and Rights of Way* (1998) para 12.77.

reserved and if the interference is minor.[35] It has not been established whether an alteration of a right of way will be prohibited in all cases even if the alteration is equally convenient to the owner of the dominant tenement.[36] In *Greenwich Healthcare NHS Trust v London and Quadrant Housing Trust*,[37] Lightman J stated that a legal rule prohibiting the relocation of a servitude may frustrate the beneficial development of servient land. On the other hand Lightman J mentioned *obiter* that a possible reason for the application of such a rigid approach regarding the relocation of a servitude, is that the effect of the new rule may be that the dominant owner loses his property right to the servitude over the original way.[38]

The discussion of the position in these foreign jurisdictions can be regarded as fruitful because it enhances law reform, showing that the law cannot remain rigid and needs to continually change in order to meet changing conditions. The flexible legal approach as adopted in *Linvestment* clearly finds support in a number of foreign jurisdictions, where unilateral relocation of specified servitudes are allowed under the conditions and requirements indicated above.

6.4 Constitutional analysis

Although some of the jurisdictions in the comparative law chapter illustrate a preference for a flexible approach regarding the relocation of servitudes, the court in *Linvestment* failed to test the constitutional implications that the flexible legal approach may have for the dominant owner. Chapter 4 considers the constitutional implications regarding the application of a flexible legal approach pertaining to the unilateral relocation of a specified servitude of right of way. The aim of the chapter was to evaluate whether the result of the *Linvestment* judgment constituted an arbitrary deprivation of property rights for the dominant estate owner that may be in conflict with section 25(1) of the Constitution. A second constitutional aspect of the decision in *Linvestment* is the question whether the

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[35] *Overcom Properties v Stockleigh Hall Resident Management* [1989] 1 ELGR 75 CA. Complete removal of a promised right may be a derogation from the grant: *Saeed v Plustrade* [2001] EWCA Civ 2011, [2002] 2 EGLR 19. See Sparkes P *A New Land Law* (2nd ed 2003) para 32.03.
[36] Harpum C, Bridge S & Dixon M *The Law of Real Property* (7th ed 2008) paras 30-003 – 30-004.
[37] *Greenwich Healthcare NHS Trust v London and Quadrant Housing Trust* [1998] 1 WLR 1749 at 1755.
[38] *Greenwich Healthcare NHS Trust v London and Quadrant Housing Trust* [1998] 1 WLR 1749 at 1755.

decision could constitute an expropriation of property and, if so, whether such an expropriation is in conflict with sections 25(2) and 25(3) of the Constitution.

The structure of the analysis as set out in the *FNB* case was applied to *Linvestment* in chapter 4 to determine whether the legal dispute in *Linvestment* constituted a deprivation in terms of section 25(1) or an expropriation in terms of section 25(2) of the Constitution.[39]

In the first instance, it had to be determined whether the law or conduct complained of affected "property" as understood by section 25. In *Linvestment* the owner of the dominant estate was deprived of an aspect of his registered servitutal entitlement, namely the right to have a say in the location of the servitude. It can be said that the interest that the owner of the dominant estate has over the servient estate is a real interest in property which ought to qualify for protection in terms of section 25 of the Constitution.[40]

Secondly, it had to be determined whether there was a deprivation of the property. It can be argued that a deprivation occurred in *Linvestment* when the court authorised the unilateral relocation of a specified servitude of right of way by a servient owner.[41] When a right of way that is registered and clearly defined in the title deed is relocated, it has the effect of depriving the dominant owner of a right that he held, namely to have a say in the location of the servitude.

Finally, it had to be determined whether the deprivation was consistent with the provisions of section 25(1) of the Constitution. Section 25(1) provides that no one may be deprived of property except in terms of law of general application and that no law may permit arbitrary deprivation of property. It is clear that the common law rule as developed in *Linvestment*, namely that the owner of the servient estate is entitled to relocate a servitude unilaterally,

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[39] *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

[40] All servitudes are real rights, since they burden ownership. See Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The Principles of The Law of Property in South Africa* (2010) 239.

[41] In *Linvestment CC v Hammersley and Another* [2007] 3 All SA 618 (N) para 42 the court *a quo* held that authorising the owner of the servient tenement to relocate a servitude unilaterally, without obtaining consent from the owner of the dominant tenement, infringes the rights of the owner of the dominant tenement as contained in section 25 (1) of the Constitution. See Chapter 4.

is law of general application since the rule aims to strike a balance between the competing interests and rights of both parties.[42]

A deprivation will be regarded as arbitrary if there is insufficient reason for the deprivation or if it is procedurally unfair.[43] It can be argued that the policy reasons provided for the deprivation in *Linvestment*[44] provide sufficient reason for the deprivation. The purpose of the amended rule is to authorise the owner of the servient tenement to deviate from the initial servitutal agreement unilaterally and against the will of the owner of the dominant tenement, particularly if upholding the initial agreement will have the effect of prejudicing the servient owner in an unjustifiable manner. The owner of the servient tenement is authorised to relocate the servitude unilaterally if the alternative route does not create an inconvenience for the owner of the dominant tenement and if the owner of the servient tenement pays all costs incurred in the relocation of the servitude.[45]

The court in *Linvestment* did not specify whether obtaining a declaratory order is a prerequisite for the unilateral relocation of a specified servitude of right of way. The absence of a declaratory order authorising the relocation of a servitude may be procedurally unfair, in that it would allow the owner of the servient tenement to resort to self-help.[46] In that case the effect of the amended rule could indeed bring about an arbitrary deprivation.[47]

Since there is a possibility that the deprivation in *Linvestment* may be procedurally unfair, the next step of the analysis was to determine whether the deprivation could be justified under section 36 of the Constitution. A deprivation will be justified in terms of section 36 if there are no less restrictive means to achieve the purpose of the recently developed common law rule. A less restrictive way of achieving the same purpose as the recently developed common law in *Linvestment* would be to require a court order prior to

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[42] Van der Walt AJ *Constitutional Property Law* (2005) 144; *Thebus and Another v S* 2003 (10) BCLR 1100 (CC) para 31.
[43] *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.
[44] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 31.
[45] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 35.
[46] See Chapter 5 section 5.4. *Brian v Bowlus* 399 So 2d 545 (La 1981) at 549. See also Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 57-58.
[47] *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

relocation. In the absence of the requirement that there should be a court order before relocation can take place, it can be argued that the deprivation would not be justifiable under section 36 of the Constitution. A deprivation will not be regarded as arbitrary if one assumes that the relocation of the servitude is authorised by a court order. In that case, the deprivation in *Linvestment* complies with the requirements in section 25(1) of the Constitution. Therefore, the next step is to determine whether the deprivation amounts to an expropriation for purposes of section 25(2).

Section 25(2) of the Constitution provides that property may only be expropriated in terms of law of general application; for a public purpose or in the public interest; and subject to payment of compensation that is just and equitable. The deprivation in *Linvestment* was not aimed at forcibly acquiring property for a public purpose.[48] The purpose of the rule is to make one party better off without making the other party worse off and to improve the use of private land.[49] Therefore, the deprivation cannot be characterised as an expropriation.

6.5 Policy analysis

The aim of chapter 5 was to evaluate whether it is justifiable for courts to overturn long-established common law principles based on the grounds of justice, equity and practicality. Calabresi and Melamed's property and liability rule paradigm was one of the paradigms used to frame the debate about the relocation of servitudes.[50] This paradigm illustrates how entitlements can be protected by property and liability rules. Furthermore, it also illustrates when policy makers should apply property and liability rules respectively to protect entitlements. Calabresi and Melamed's property and liability rule paradigm suggests that property rules[51] should be the preferred remedy when transaction costs are

[48] Van der Walt AJ *Constitutional Property Law* (2005) 242-269.
[49] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1 – 15 at 5. See footnote 224 in Van der Walt AJ *Constitutional Property Law* (2005) 239.
[50] Calabresi G & Melamed AD "Property rules, liability rules and inalienability: One view of the cathedral" (1972) 85 *Harv LR* 1089-1128.
[51] The traditional common law rule regarding the unilateral relocation of a specified servitude of right of way can be classified as a pure property rule.

low, because they facilitate mutually beneficial bargaining between private parties.[52] By contrast, liability rules will be preferred when transaction costs are high, because liability rules[53] allow the court to facilitate exchanges when bargaining is not possible.[54]

The pliability rule paradigm of Bell and Parchomovsky[55] was also used to frame the debate about the relocation of servitudes. Unlike Calabresi and Melamed's property and liability paradigm, the pliability paradigm provides a clear insight as to what the structure of the legal rule regarding the relocation of servitudes should look like in order for the rule to strike a balance between the rights of the dominant and servient owners. When a legal rule such as the flexible legal approach is structured in accordance with the pliability paradigm, it fully captures the protection of the entitlements of the owner of the dominant tenement and the owner of the servient tenement.[56] The flexible legal approach is designed to accommodate the interests of the owner of the servient tenement and the owner of the dominant tenement. Furthermore, the flexible legal approach allows each of the owners to maximize the utility of his or her property without damaging the other.[57] Pliability rules have the effect of protecting legal entitlements where the protection of entitlements can shift between property and liability rules as long as the specified requirements have been complied with.[58] In contrast to property and liability rules that are regarded as static, pliability rules can be regarded as dynamic in nature.[59]

If one takes the insights of Bell and Parchomovsky into consideration, then one can draw the inference that the grounds on which the court in *Linvestment*[60] based its judgment, namely fairness, justice and equity, are to a certain extent credible and convincing. The conclusion reached in *Linvestment* is sensible from a practical point of view. Lovett is

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[52] Miceli TJ "Property" in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 at 249. See Anonymous "The right of owners of servient estates to relocate easements unilaterally" (1996) 109 *Harv LR* 1693-1710.
[53] The flexible legal approach can be classified as a liability rule.
[54] Miceli TJ "Property" in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 at 249.
[55] Bell A & Parchomovsky G "Pliability rules" (2002) 101 *Mich LR* 1-79.
[56] Bell A & Parchomovsky G "Pliability rules" (2002) 101 *Mich LR* 1-79 at 5.
[57] French S "Relocating easements: Restatement (third), servitudes § 4.8 (3)" (2003) 38 *Real Prop Prob & Tr J* 1-15 at 11-12.
[58] Bell A & Parchomovsky G "Pliability rules" (2002) 101 *Mich LR* 1-79 at 5; Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 16.
[59] Bell A & Parchomovsky G "Pliability rules" (2002) 101 *Mich LR* 1-79 at 5.
[60] [2008] 2 All SA 493 (SCA).

correct when he states that the flexible legal approach is pragmatic. The flexible legal approach assists courts in viewing servitudes as evolving relationships between parties with concurrent interests in the same land and not merely as inflexible property rights.[61] However, from a policy and constitutional point of view, the flexible legal approach is inadequate. In *Linvestment* the court did not state whether obtaining judicial consent prior to the unilateral relocation of a servitude is a prerequisite.[62] If obtaining judicial consent prior to relocation is not required, it would allow the owner of the servient tenement to resort to self-help.[63] The recommendations discussed below illustrate how the pliability approach could be further improved, in order to strike a balance between the interests of the owner of the dominant tenement and the owner of the servient tenement.

6.6 Recommendations

Even though the policy grounds that the court based its decision on are welcomed and to a certain extent convincing, there is room for improvement. Lovett[64] proposed three pliability rule refinements to the flexible legal approach. First, he states that the flexible legal approach should be improved by creating a two-step triggering mechanism.[65] According to Lovett, this two-step mechanism can be used to reinforce the property rule protection phase of the pliability rule.[66] This two-step triggering mechanism requires a definite time period during which the location of the servitude cannot be altered without obtaining the necessary consent from the owner of the dominant tenement.[67] According to Lovett,[68] this

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[61] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 77.
[62] See Chapter 4 and 5.
[63] See Chapter 5 section 5.4. *Brian v Bowlus* 399 So 2d 545 (La 1981) at 549. See Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 57-58.
[64] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 6-9, 43-72.
[65] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 6.
[66] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 6.
[67] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 6.
[68] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 6.

development would respond to the efficiency-oriented critiques[69] of the flexible legal approach. If the property rule protects the dominant owner's entitlement for a defined period of time, it provides dominant owners a measure of certainty and predictability.[70]

Lovett's[71] second proposed improvement of the flexible legal approach includes two elements. He advocates that once the period during which the relocation of servitudes is prohibited terminates, the location of a servitude should only be changed without the dominant owner's consent if the servient owner obtains a declaration from a court that the utility and fairness criteria of the flexible legal approach have been complied with. The servient owner has to prove that he will be materially inconvenienced in the use of his property if the status *quo* is maintained, that the relocation will not prejudice the owner of the dominant tenement and that he will pay all costs incurred in the relocation of the servitude.[72]

The third pliability rule improvement that could be attached to the flexible legal approach would grant the court the discretion to award compensatory damages.[73] Lovett[74] states that he designed this refinement to bring more efficiency and fairness to the relocation of servitudes. Furthermore, Lovett[75] states that this third pliability rule refinement responds to the critique that liability rules may discourage individuals from learning how to bargain with each other. In addition, Lovett asserts that if a servient owner complies with all the requirements of the flexible legal approach and the court awards no damages, then the servient owner will capture the entire gain from the transaction without having to share it with the dominant owner, which might not have happened if the parties settled the dispute

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[69] In the US judgment of *Stamatis v Johnson* 71 Ariz 134, 224 P 2d 201 (1950) 202-203, the court held that if the location of a servitude is treated as variable it would incite litigation and depreciate the value and discourage the improvement of the land upon which the servitude is charged. This decision has been confirmed in *Davis v Bruk* 411 A 2d 660 (Me 1980) 665. See Chapter 5 section 5.2.

[70] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 6.

[71] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 7.

[72] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 35.

[73] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 7.

[74] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 7.

[75] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 7.

by themselves by means of bargaining.[76] If courts are given the power to award a premium or bonus compensation, it will prevent the flexible legal approach from becoming "a vehicle for one private individual to capture all of the economic gain of a non-consensual transaction".[77] Several goals will be achieved if courts are given the power to award some premium compensation in situations where the relocation of a servitude is required.[78] One of these goals is that it will most probably provide incentives to servient owners to bargain about how the servitude ought to be relocated.[79] Servient owners will most likely negotiate about how the servitude ought to be relocated rather than risking the possibility of being subjected to a compensation penalty.[80] It would also give servitude holders protection against servient owners who are unwilling to share the expected net surplus to be gained by the relocation of the servitude.[81] In addition, the third refinement of the flexible legal approach could also help compensate the dominant owner for the loss of any subjective values associated with servitutal rights.[82]

The flexible legal approach as applied in Linvestment should be refined in its implementation in the direction of a well-defined pliability rule consistent with the vision of Bell and Parchomovsky. If the three refinements suggested by Lovett are embedded in the judicial rules regulating the relocation of servitudes as stated in *Linvestment*, then the new rule will undoubtedly become a leading example of the value of pliability rule modelling as a mode for entitlement protection design.[83]

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[76] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 64.
[77] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 67.
[78] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 70.
[79] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 70.
[80] Lovett JA refers to footnote 72 in Krier JE & Schwab SJ "Property rules and liability rules: The cathedral in another light" (1995) 70 *NYU LR* 440-483 at 465; Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 70.
[81] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 70.
[82] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 70.
[83] Lovett JA "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Conn LR* 1-77 at 77.

Abbreviations

Colum LR	Columbia Law Review
Conn LR	Connecticut Law Review
Edin LR	Edinburgh Law Review
Eur Jnl Law & Econ	European Journal of Law and Economics
Geo Wash LR	George Washington Law Review
Harv LR	Harvard Law Review
J Comp L	Journal of Comparative Legislation and International Law
J Legal Stud	Journal of Legal Studies
JQR	Juta's Quarterly Review of South Africa Law
LAWSA	The Law of South Africa
Loy LR	Loyola Law Review
Mich LR	Michigan Law Review
Mo LR	Missouri Law Review
NYU LR	New York University Law Review
Real Prop Prob & TR J	Real Property, Probate and Trust Journal
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SCA LR	Southern California Law Review
Stell LR	Stellenbosch Law Review
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
Tul LR	Tulane Law Review
Yale LJ	Yale Law Journal

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